Feb 20 1872
motion to dismiss.
Submitted

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~311~~ 112

JOHN D. WORTHY, EXECUTOR OF ARCHIBALD D. PALMER, DECEASED, PLAINTIFF IN ERROR,

vs.

HENRY MARSTON.

Dismissed on motion of
IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.
Defendant. Counsel

FILED NOVEMBER 28, 1870.

Motion to dismiss filed Nov 28 1872
Argument
Submitted
~~Decided~~
Mr Chief Justice Waite

# SUPREME COURT OF THE UNITED STATES.

## No. 311.

---

**JOHN D. WORTHY, EXECUTOR OF ARCHIBALD D. PALMER, DECEASED, PLAINTIFF IN ERROR,**

**vs.**

**HENRY MARSTON.**

---

**IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.**

---

**INDEX.**


| | Original. | Print. |
|---|---|---|
| Petition | 1 | 1 |
| Service accepted | 2 | 1 |
| Answer | 2 | 1 |
| Receipt | 3 | 2 |
| Affidavit | 4 | 2 |
| Petition for commission to take testimony | 4 | 2 |
| Service accepted | 6 | 2 |
| Order | 6 | 3 |
| Answer to interrogatories | 7 | 3 |
| Notes in favor of the successor of E. Mayes | 9 | 4 |
| Note of testimony on trial | 10 | 4 |
| Amendment making parties | 11 | 5 |
| Service accepted | 11 | 5 |
| Reasons for judgment | 11 | 5 |
| Judgment | 13 | 5 |
| Motion for new trial | 13 | 6 |
| Orders from the minutes | 14 | 6 |
| Motion for appeal | 15 | 6 |
| Appeal bond | 15 | 7 |
| Certificate | 16 | 7 |
| Extract from docket | 17 | 7 |
| Motion for certiorari | 17 | 8 |
| Order of supreme court | 19 | 8 |
| Extract from the minutes | 19 | 8 |
| Assignment of errors | 19 | 9 |
| Answer of the clerk to the writ of certiorari | 21 | 9 |
| Extracts from docket | 22 | 10 |
| Extracts from the minutes | 22 | 10 |
| Extracts from the minutes | 22 | 11 |

*Receipt.*

4 $1,000. Received of Henry Marston, esq'r., July 9th, 1866, the sum of one thousand dollars, to be credited on his note in favor of James O. Fuqua, and now held by the estate Archibald D. Palmer.

(Signed) JOHN McVEA,
*Att'y for Estate of A. D. Palmer.*

Filed February 5th, 1868.

(Signed) H. SKIPWITH,
*Dep'y Clerk.*

*Affidavit.*

Personally appeared before me, the undersigned authority, Henry Marston, who, being duly sworn, says that facts and allegations contained in the within answer are true and correct, to the best of his knowledge and belief.

(Sign'd) HENRY MARSTON.

Sworn to and subscribed before me this 6th day of February, 1868.

(Signed) W. A. KNOX, *Clerk.*

*Petition for commission to take testimony of J. O. Fuqua.*

In the above cause now comes the defendant, and prays that an order and commission issue to any judge or justice of the peace of the parish of East Baton Rouge, said State, to take the answers of
5 James O. Fuqua, esq., of said parish of East Baton Rouge, to the interrogatories below, said *said* answers to be used as evidence by the defendant on the trial of this cause, and that plaintiff have due notice of this application.

Int. 1st. Are you acquainted with the parties to this suit?

" 2nd. Have you or not, in any way, any interest in this suit?

" 3rd. Did or did not the defendant, H. Marston, give you a note in the following words and figures:

"$1,687 53. CLINTON, LA., *Oct. 1st*, 1863.

"One day after date I promise to pay James O. Fuqua or order sixteen hundred and eighty-seven $\frac{53}{100}$ dollars, with eight per cent. interest from date till paid, value received.

(Signed) "HENRY MARSTON."

" 4th. Was or was not said note transferred by you, in writing, after maturity, to said plaintiff, A. D. Palmer, "without recourse?"

" 5th. Was or was not ($949 25) nine hundred and forty-nine $\frac{25}{100}$ dollars of said note given as a part of the purchase price of an African slave?

" 6th. Please state any other fact or circumstance that may benefit the defendant herein.

6 (Signed) By his attorney, L. M. PIPKIN.

*Service accepted.*

I hereby accept service of the within interrogatories, and consent the

original shall go out, waiving all legal objections to the manner in which the interrogatories are put.

Sept. 15th, 1868.

(Signed) JOHN McVEA.

*Order.*

Let a commission issue, as prayed for, returnable on or before Monday, the 19th day of October, 1868.

This 16th Sept'r, 1868.

(Sign'd) W. A. KNOX, *Clerk.*

Filed September 16th, 1868.

(Sign'd) W'M A. KNOX, *Clerk.*

The State of Louisiana to any judge or justice of the peace, parish of East Baton Rouge, said State, greeting:

Know ye that we, reposing confidence in your prudence and fidelity, do by these presents give unto you authority diligently to examine James O. Fuqua, esq., in a certain suit now pending in our fifth judicial district court, and in which A. D. Palmer is plaintiff, and Henry
7 Marston is defendant, and as well on the part of the said plaintiff as of the said defendant.

Wherefore we desire you at certain times and places by you to be appointed for that purpose, you do cause the said James O. Fuqua to come before you; that you then and there examine him upon his oath, first taken before you upon the Holy Evangelists; that you reduce his examination to writing; and, when you so shall have taken, that you send the same, closed up under your seal, to us in our said court, at the court-house in the parish of East Feliciana, without delay, and have you then and there this writ.

Witness the Hon. R. T. Posey, judge of said court, this the 16th day of September, A. D. 1868.

(Signed) W. A. KNOX, *Clerk.*

*Answer to interrogatories.*

STATE OF LOUISIANA,
*Parish of East Baton Rouge:*

Personally appeared before me, the undersigned authority, duly commissioned and sworn, James O. Fuqua, a resident of said parish, of full age, when, by virtue of the annexed commission issued
8 from the honorable the fifth district court in and for the parish of East Feliciana, said State, in the case of A. D. Palmer vs. H. Marston, No. 477 of the docket of said court, I swore him according to law to make true answers to the interrogatories propounded to him in said case, and he answered said interrogatories as follows:

Int'y 1st. I was acquainted with the plaintiff in his lifetime, and am acquainted with the defendant.

" 2nd. I have no interest in the result of this suit.

" 3rd. The defendant did give me a note for about the amount stated. I have not seen the note for several years, but believe that this interrogatory contains a correct copy of it.

" 4th. This note was transferred by me without recourse, and after maturity to Col. D. C. Hardee, who represented himself as the agent of the plaintiff, and as acting for him in this matter.

" 5th. At the time of the settlement between Mr. Marston and myself, Oct. 1st, 1863, I held two notes of his which were given at the probate sale of Mrs. Mayes for a part of the purchase price of a negro slave named, if I remember correctly, Dick.
9 He was a blacksmith. These notes were dated Feb'ry 17th, 1855, and matured, respectively, at one and two years from date. They were for $436 67 each, with 8 % interest from date. A payment of $151 30 was credited on each. The balance, including interest up to Oct. 1st, 1863, amounted to $945 28. This balance was included in the note transferred by me to Col. Hardee for the plaintiff, as above stated.

" 6th. I know of no other fact pertinent to this issue.

JAMES O. FUQUA.

And the said witnesses, having written out his said answers, signed the same in my presence.

Sept. 21st, 1868.

(Sign'd) B. F. BRYAN, *Clerk.*

Opened and filed Sept, 24th, 1868.

(Signed) W. A. KNOX, *Clerk.*

*Notes in favor of the succession of Emily Mays, dec'd, or bearer.*

$436 66⅔. CLINTON, *Feb'ry 17th*, 1855.

Two years after date we, or either of us, promise to pay to the legal representatives of the succession of Emily Mays, dec'd, or bearer, four hundred and thirty-six $\frac{66\ 2\cdot3}{100}$ dollars, with eight per cent. interest thereon per annum from date until paid for, value received.

10 The payment of the above note secured by the recording procès verbal of sale in mortgage record K, page 308, April 16th, 1858.

J. C. WHITE, *Recorder.*

$436 66⅔. CLINTON, *Feb'ry 17th*, 1855.

One year after date we, or either of us, promise to pay to the legal representatives of the succession of Emily Mays, dec'd, or bearer, four hundred and thirty-six $\frac{66\ 2\cdot3}{100}$ dollars, with eight per cent. interest per annum thereon from date until paid, per value received.

The payment of the above note secured by the recording procès verbal of sale in mortgage record book K, page 308, April 16th, 1855.

J. C. WHITE, *Recorder.*

Filed Oct. 6th, 1868.

(Signed) W. A. KNOX, *Clerk.*

*Note of testimony on trial.*

Plaintiff offers note sued on. Signature admitted and indorsement credit admitted, as stated in the answer.

Closed.

Defendant offers receipt annexed to the answer, as admitted by plaintiff. Deposition of J. O. Fuqua. Offers extract of probate sale of Emily M. Mays, 17th Feb'ry, 1855. Two notes given by H. Marston at said sale.

11 Closed Oct. 6th, 1868.

Filed Oct. 6th, 1868.

(Signed) W. A. KNOX, *Clerk.*

JOHN D. WORTHY, EX'R, VS. HENRY MARSTON.

*Amend't making parties.*

In the above case comes John D. Worthy, and represents that, since the death of the plaintiff, A. D. Palmer, he has been appointed executor of the last will and testament of the deceased, and in his said capacity now makes himself a party plaintiff in the above-entitled suit; further represents that in his said capacity he adopts the petition herein filed and prays that defendant have service hereof, and that after due and legal proceedings, that he have judgment against said defendant, Henry Marston, for said sum as claimed in the original petition and for costs and general relief in the premises.

(Signed) By his attorneys, JOHN McVEA,
" CROSS & HARDEE.

*Service accepted.*

Service accepted and time waived.
(Signed) L. M. PIPKIN, *Att'y.*

Filed Oct. 6th, 1868.
(Signed) W. A. KNOX, *Clerk.*

*Reasons for judgment.*

12 In this case the note was transferred by Fuqua to plaintiff's agent after its maturity, and is therefore subject to whatever equities there may be in favor of the maker, against Fuqua or the plaintiff.

According to his testimony, Fuqua was aware of the consideration of the two notes given by defendant at probate sale of the succ'on of Emily Mays, dec'd, as part of the purchase price of a negro man, Dick, which two notes in the settlement of Oct. 1st, 1863, between Fuqua and Marston were settled or novated by the note now in suit as a portion of the amount thereof, and which were surrendered to defendant. It appears so from the evidence of his acknowledgments on the said notes as att'y of W. T. Mays, the tutor, of having received $151 30 on each on the very day when they were made; that he was acquainted with the consideration before he became the owner by the indorsement of the tutor, and therefore, although he may have been the owner of them before their several maturities, yet having notice before the indorsement, he would be subject to the equities of the maker, and whilst the
13 law remains as pronounced by the late supreme court in the case of Wainwright vs. Bridges and other cases, Fuqua, were he suing to recover the amount of the note which is the subject of this controversy, would be defeated by this plea of failure of consideration. Therefore the plaintiff must fail also. The credit being allowed, the judgment must be for defendant.

(Signed) R. T. POSEY, *Judge.*

Filed Oct. 20th, 1868.
(Signed) W. A. KNOX, *Clerk.*

*Judgment.*

This cause came up to be heard according to previous assignment,

and, after argument, was taken under advisement by the court, and the law and evidence being in favor of the defendant, Henry Marston, and by reason thereof, it is therefore ordered, adjudged and decreed, that plaintiff's demand be rejected, with all costs of suit.

Done, read, and signed in open court, this 27th Oct., 1868.

(Signed) R. T. POSEY,
*Judge, 5th Jud. Dist't.*

*Motion for new trial.*

In this matter now comes the plaintiff and move the hon. court
14 for a new trial on the ground that the judgment of the court is contrary to the law and the evidence.

(Signed) By his attorneys, McVEA & KILBOURNE,
CROSS & HARDEE.

Filed Oct. 20th, 1868.

(Signed) W. A. KNOX, *Clerk.*

*Orders from the minutes.*

THURSDAY, *May* 16*th*, 1868.

PALMER *vs.* MARSTON.

Continued with leave to make parties.

WEDNESDAY, *Feb'ry* 5*th*, 1868.

On motion of L. M. Pipkin, esq., of counsel for defendant, and filing answer, it is ordered that the judgment by default herein be set aside.

On motion of same counsel, ordered that the motion to transfer this cause to the jury docket be filed for a hearing.

MONDAY, *Oct.* 5*th*, 1868.

Assigned for trial, Tuesday, Oct. 6th.

MONDAY, *October* 19*th*, 1868.

On motion of McVea & Kilbourne, and Cross & Hardee, esq'rs., of counsel for plaintiff, it is ordered he have leave to file his motion for a new trial in this case.

WEDNESDAY, *Oct* 21*st*, 1868.

The motion heretofore filed for a new trial, coming on for trial,
15 after argument, it is ordered that the same be overruled.

*Motion for appeal.*

TUESDAY, *Oct.* 27*th*, 1868.

On motion of Cross & Hardee, and McVea & Kilbourne, esq'rs., of counsel for plaintiff, it is ordered he be granted a devolutive appeal, returnable to the supreme court of the State of Louisiana, holding at the city of New Orleans, on the fourth Monday of February, A. D. 1869, on his giving bond with resident solvent surety in the sum of one hundred dollars, conditioned according to law.

*Appeal bond.*

The State of Louisiana, parish of East Feliciana, 5th jud. dist. court.

A. D. PALMER. *vs.* HENRY MARSTON } No. 477.

Know all men by these presents that John D. Worthey, ex'or, as principal, and K. A. Cross and D. C. Hardee, as sureties, are held and firmly bound unto the clerk of said court in the sum of one hundred dollars, lawful money of the United States, and for the faithful payment
16 hereof we bind ourselves, our heirs, assigns, &c. Sealed, signed and delivered, 16th day of February, A. D. 1869.

Whereas the above bound John D. Worthy, ex'or, has obtained from the hon. court aforesaid an order granting him a devolutive appeal, returnable to the supreme court, at the city of New Orleans, on the fourth Monday of February, 1869.

Now, this obligation is given as surety that the said John D. Worthy, ex'or, shall well and truly prosecute said appeal, and pay and satisfy whatever judgment may be rendered against him, if he *he* cast in said appeal, or that the same shall be made out of the proceeds of the sale of his estate, real or personal, whereof he is the owner; otherwise the said surety to be liable in his place.

(Signed) JOHN D. WORTHY,
*For K. A. Cross.*

(Signed) K. A. CROSS.
(") D. C HARDEE.

Witness:
(Sig'd) W. H. KNOX,
*Dep'y Clerk.*

Filed Feb'ry 16th, 1869.
(Sign'd) W. A. KNOX,
*Dep'y Clerk.*

*Certificate.*

The State of La., parish of East Feliciana, clerk's office, 5th dist. court.

17 I, C. F. Huston, clerk of said court, do hereby certify that the foregoing sixteen pages contain a full, true, and complete transcript of the record of suit No. 477, entitled A. D. Palmer, vs. Henry Marston, of the docket of the 5th dist. court, as well as of all the proceedings had, and of the documents filed in said suit, and of all the evidence adduced on the trial thereof.

In testimony whereof I sign hereto officially and affix the seal of said court, at Clinton Parish, and State first aforesaid, this 16th day of Feb'ry, A. D. 1869.

(Signed) C. F. HUSTON, *Clerk.*

*Extract from docket.*

Supreme court of La.

FEB'RY 26TH, 1869.

Filing record from the 5th dist. court, parish of East Feliciana, No. 477. Docketing.

MARCH 1ST, 1869.

Filing briefs for pl'ff and appellant. Called and fixed for March 3rd, 1869.

*Motion for certiorari.*

MARCH 3RD, 1869.

Supreme court of La.

PALMER *vs.* MARSTON. } No. 2118.

18 Filed March 3rd, 1869.
(Signed) JOHN F. DEANE, *Clerk.*

In this cause now comes Henry Marston, defendant and appellee, and suggests respectfully that the transcript herein is defective in the following particulars, viz:

The notes of testimony are defective in that the offerings of testimony are not correctly stated.

That the notes which were offered in evidence by defendant, and which are found on page 9 of the record, are not correctly transcribed, there appearing no signatures to the same, nor indorsements thereon, as are in the originals.

Wherefore he prays that an order may issue to the clerk of the fifth jud. dist. court of the parish of East Feliciana commanding him to complete the transcript in this cause in the foregoing particulars.

(Signed) McVEA & HUNTER, *Att'ys.*

Personally came and appeared before me, the undersigned authority, S. E. Hunter, who being sworn, says the facts in the foregoing application are true. So help him God.

(Signed) S. E. HUNTER.

19 Sworn to and subscribed before me this the 3d March, 1869.
(Signed) M. P. JULIAN,
*Dep'y Clerk.*

*Order of the court.—Extract from the minutes.*

WEDNESDAY, *March 3rd*, 1869.

It is ordered that an order issue to the clerk of the fifth jud. dist. court of the parish of East Feliciana, commanding him to complete the transcript in this cause in the foregoing particulars, and that thirty days herefrom be granted him for that purpose.

*Extract of the minutes.*

Supreme court of La.

FRIDAY, *March 5th*, 1869.

A. D. PALMER *vs.* HENRY MARSTON. } No. 2118.

On motion of E. T. Merrick, esq., of counsel for pl'ff and appellant, and on consent thereto of counsel for defendant and appellee,

It is ordered that the counsel for appellant be allowed time, until the return on the writ of certiorari in this case shall have been made, in which to file assignment of errors.

*Assignment of errors.*

Supreme court of La.

A. D. PALMER *vs.* HENRY MARSTON. } No. 2118.

20 Filed March 22nd, 1869.
(Signed) M. P. JULIAN,
*Dep'y Clerk.*

In this case the appellant comes and assigns for error, 1st. That the lower court erred in assuming that the plaintiff was chargeable with notice, and was subject to any equities supposed to exist between the original parties to the promissory note sued on.

2nd. That the lower court also erred in holding that article No. 128 of the constitution of Louisiana of the year 1868, in these words, "Contracts for sale of persons are null and void, and shall not be enforced by the courts of this State," operating upon past contracts was valid, and that it avoided the promissory note sued on in this case, because the same was given as a part of the price of a slave, whereas said provision in said constitution of the State of Louisiana impairs, and was intended to impair the obligation of contracts, and does impair the contract sued on, and violates section ten of article one of the Constitution of the United States, and is itself unconstitutional and void.

21 Wherefore plaintiff pray for a reversal of the judgment rendered in this case, and for judgment in conformity to the prayer of their original petition.

(Signed) By CROSS & HARDEE.

RACE, FOSTER, &
E. T. MERRICK,
*For Pl'ff.*

*Answer of the clerk to the writ of certiorari.*

STATE OF LOUISIANA,
*Parish of East Feliciana:*

Clerk's office, fifth dist. court.

In obedience to the order of the hon. the sup. court of the State of La., rendered in suit No. 2118 of the docket of the suits of said court, on the 3rd day of March, A. D. 1869, I, C. F. Huston, clerk of the court first aforesaid, do hereby certify that the transcript complained of as being defective in the notes of testimony is a true transcript from the original notes now on file in my office, and I have no means of supplying defects, if any such exist. The following are the signatures to the notes, to wit, on both notes the same:

(Erased) "HENRY MARSTON."
(Erased) "J. C. HARDEE."

The following are the indorsements on the 1st note, as follows:

1. "W. T. MAYES, *Tutor.*"

22 2. "$151 30. Rec'd one hundred and fifty-one $\frac{30}{100}$ dollars on this note, Feb'ry 17th, 1855.

"J. O. FUQUA,
"*Attorney for W. T. Mays, Tutor.*

3. "This note reacknowledged Sept. 20th, 1861.
(Erased) "HENRY MARSTON."

The following are the indorsements on the second note, to wit:

1. "W. T. MAYES, *Tutor.*

2. "$151 30. Rec'd one hundred and fifty-one $\frac{30}{100}$ dollars on this note, Feb'ry 17th, 1855.

"J. O. FUQUA,
"*Att'y for W. T. Mays, Tutor.*"

3. "The within note is acknowledged, and the benefit of the plea of prescription waived.
"April 6th, 1861.
(Erased) "HENRY MARSTON."

And I further certify that the foregoing is a full, complete, and true copy, and that I have complied, to the full extent of my ability, with the order of the hon. supreme court rendered herein.

Given under my signature official and the seal of said court at Clinton, March 25th, 1869.

[SEAL.] (Signed) C. F. HUSTON, *Clerk.*

*Extracts from docket.*

FEB'RY 28TH, 1870.

Filing briefs for plaintiffs.

MARCH 1ST, 1870.

23 Called and fixed for March 2nd, 1870.

MARCH 2ND, 1870.

Fixed for March 3rd, 1870.

*Extract from the minutes.*

Supreme court of La.

MARCH 3RD, 1870.

A. D. PALMER
*vs.*
HENRY MARSTON. } No. 2118.

This case was called for trial, and the court, having heard argument from E. T. Merrick, esq., of counsel for pl'ff and appellant, and the usual hour for the adjournment of the court having arrived, ordered the case

to be continued to to-morrow, Friday, 4th inst., for resumption of argument.

*Extract from the minutes.*

Supreme court of La.

FRIDAY, *March 4th*, 1870.

A. D. PALMER
*vs.*
HENRY MARSTON. } No. 2118.

This case was called for resumption of argument from yesterday, Thursday, 3rd instant, and the court, having heard argument from E. T. Merrick, esq., of counsel for pl'ff and appellant, and James H. Muse, esq., of counsel for def't and app'ee, took the same under advise-
24 ment upon the briefs for the appellant and the papers now on file, and the briefs to be filed on behalf of both parties by counsel; the briefs for the appellee to be filed within four days, and those for appellant within ten days from this date.

*Extracts from docket.*

MARCH 9TH, 1870.

Filing briefs for pl'ffs.
Filing " for defendant.

*Extract from the minutes.*

Supreme court of La.

MARCH 28TH, 1870.

A. D. PALMER
*vs.*
HENRY MARSTON. } No. 2118.

On appeal from the 5th jud. dist. court, parish of East Feliciana—
It is ordered and adjudged that the judgment appealed from be affirmed with costs.

*Opinion & decree.*

Supreme court of La.

A. D. PALMER
*vs.*
HENRY MARSTON. } No. 2118.

Filed March 28th, 1870.
(Signed) M. P. JULIAN,
*Dep'y Clk.*

Mr. Justice HOWE:

The balance of the note in suit in this action was clearly given
25 in renewal of obligations arising from the sale of a slave, and is vitiated by this fact.

It cannot be recovered under our jurisprudence, as settled in Wainwright vs. Bridges, 19 Ann., 231, and the numerous cases which have followed that decision.

Under the rule established in the case of Graves vs. Clark, 21 Ann., p. 567, it is immaterial whether the plaintiff became a holder before or after maturity.

We have been asked by counsel to pass, in this case, upon the validity under the Constitution of the United States, of the article 128 of the Louisiana constitution of 1868, which declares that contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State.

We do not feel it necessary to do this. The rule that such contracts will not be enforced by the courts of this State was established in our jurisprudence in the year 1867. It was firmly settled and repeat-
26 edly acted upon before the adoption of the constitution of 1868, and has been invariably adhered to ever since. The question whether this article 128 be valid or invalid as an act of legislation, and in relation to article 10 of the Constitution of the United States, may possess considerable speculation interest, but we do not perceive that it can, in this case, have a practical influence upon the result.

For the reasons given, it is ordered and adjudged that the judgment appealed from be affirmed with costs.

*Petition for rehearing.*

Supreme court of La.

A. D. PALMER
*vs.*
HENRY MARSTON. } No. 2118.

Filed April 11th, 1870.
(Signed) M. P. JULIAN,
*Dep'y Clerk.*

To the hon. the chief and associate justices of the sup. court of La.:

The petition of John D. Worthy, test. ex'or of the last will and testament of Archibald D. Palmer, deceased, the original plaintiff in the
27 case of A. D. Palmer vs. Henry Marston, No. 2118 of this hon. court, praying for a rehearing, respectfully represents that the plaintiff thinks the court has fallen into an error of fact in assuming that the note was (as a whole) given in renewal of the obligations arising from the sale of slave. The answer does not pretend that more than $949 25, and the proof shows only $945 28 as the balance of a debt due the Mayes estate, which entered directly or indirectly into the consideration of the note. (See p. 2.)

The balance of the note, (viz, seven hundred and forty-two $\frac{25}{100}$ dollars,) the answer virtually admits was for a valid consideration, and pretends that it was extinguished by the payment of $1,000 00. At the date of the payment, (which was made generally upon the whole note,) July 9th, 1866, two years nine months and eight days' interest was due on $1,687 53, and debt and interest amounted to $2,062 98, and left a

balance due of $1,062 98, bearing eight per cent. interest from July
28 9th, 1866. Of this balance, applying the rule adopted in the case of Sandidge vs. Sanderson, (Op. Book, No. 37, folio 471,) the credit would leave a debt still due the executor four hundred and sixty seven $\frac{54}{100}$ dollars, a sum bearing the same relation to $1,062 98 as $742 25 does to $1,687 53. Said sum of $467 54 would bear interest from July 9th, 1866, until paid. We respectfully call the attention of the court to the case above referred to of Sandidge vs. Sanderson, (22 Ann., 37; Opinion Book, 471.)

The petitioner further represents, with great respect, that the counsel for appellant desires not to be misunderstood, and he states that he did not ask an opinion upon the article 128 of the constitution of Louisiana, for a speculative purpose, but with the intention of relying on the right granted by the Constitution of the United States to carry the question before the Supreme Court of the United States at Washington for final decision, and in view of the fact that if this case had been presented before the same court who decided the case of
29 Wainwright vs. Bridges, constituted as it then was—holding the same views—judgment could not have failed to be rendered for plaintiff. In this case the counsel trusts that the court will not suppose he was or is actuated by any other motive than to ask for a decision in this case which would or will lead to the ends of justice and a final determination of a question of constitutional law, bearing, as it seemed to him, directly on the question at issue; for, in the case of Wainwright vs. Bridges, Messrs. Justices Ilsley and Labauve held that contracts for the price of slaves were valid, and Chief Justice Hyman was of the same opinion, but he thought that the vendor was bound in warranty under article 2498, and he expressly said, "plaintiff, in my opinion, would be entitled to recover if there was no warranty in the sale." (See 19th An., 240.)

There were only two of the justices of the court who held contracts for the sale of slaves void absolutely. So late as March, 1868,
30 it appears from the reports that four out of five of the justices of the supreme court maintained an action of redhibition (an action in the nature of warranty) upon the contract for the sale of a slave, and gave the plaintiff judgment for $1,800 00 and interest, reversing the judgment of the lower court. Mr. Justice Howell dissenting and adhering to his former views, said that the decision was in direct conflict with the jurisprudence on this subject, and that no warranty in such contracts exists. The decision, however, was in harmony with the opinions of the Justices Labauve, Ilsley, and Chief Justice Hyman, as expressed in Wainwright vs. Bridges, and, without going into the question of the validity of the contract, they reversed the judgment of the lower court which had been for defendant. (See McAllister vs. Freeman, Burton & Co., 20 An., 205; see also Guthrie vs. Kendig, 18 Ann., 48; 18 An., 133; Chapman vs. Mathews, 18 An., 119; Winch & Lehman vs. McRae, 18 An., 640; and Wright & Maury vs. Rogers, 18 An., 671.) There are other cases of redhibition,
31 but petitioner will not consume the time of the court in citing them.

In the case of the New Orleans Canal & Banking Co. vs. Templeton, (20 An., 141,) this court enforced a promissory note given as the price of slaves, and the court then said that the law looks with favor upon the holder of a bill and requires very cogent evidence to convict him of mala fide. In this case Fuqua, the payee of the note, never owned or sold the slave in controversy, and in taking the note payable to him-

self, was only securing a valid debt due by the Mayes estate to him. But Marston assumed this new debt to Fuqua in the consideration of the surrender of the slave notes to him. When Fuqua obtained the note what did he obtain? Manifestly these two things: 1st, the assumption by Marston of the indebtedness of the Mayes estate to him, (Fuqua,) probably for professional services and costs advanced that estate.

2nd, by the amount that Marston himself owed Fuqua. Fuqua
32 had discharged the Mayes estate, and Marston assumed in effect the debt due from the Mayes estate to Fuqua.

The plaintiff, we contend, acquired the note for value and free from all equities.

There being no obligation of warranty on the part of Fuqua, it seems to us beyond controversy (as we have already said) that the supreme court under the Constitution of 1864, would have been compelled, organized as it was, to give judgment in this case for the plaintiff, and that this court has in *in* this case in fact (because courts do not make laws) enforced article 128 of the constitution of Louisiana of 1868, against the plaintiff, as was done against Groves in the case of Groves vs. Clark & Carroll, (21 An., 567,) cited herein by this honorable court.

The plaintiff thinks this honorable court ought to have maintained the grounds of error assigned in the assignment of error on file.

33 Wherefore he prays for a rehearing, and that the judgment herein may be set aside, the judgment of the lower court reversed, and that a judgment be rendered against the defendant in accordance with the prayer contained in the original petition.

(Signed) By RACE, FOSTER, &
E. T. MERRICK,
*Attorneys for Plaintiff & Executor.*

*Extract from the minutes.—Rehearing refused.*

Supreme court of La.

WEDNESDAY, *May 25th*, 1870.

A. D. PALMER
*vs.* } No. 2118.
HENRY MARSTON.

It is ordered that the rehearing applied for in this cause be refused.

*Petition for writ of error.*

To the Hon. Joseph P. Bradley, associate justice of the Supreme Court of the United States:

The petition of John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the parish of East Feliciana, and State of Louisiana, deceased, respectfully represents that in
34 the case originally entitled A. D. Palmer vs. Henry Marston, and bearing the No. 2118 on the docket of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, and brought upon a promissory note for $ and interest, signed by said Henry Marston, and made payable to , and indorsed and held by said A. D. Palmer, deceased, there was drawn in question the validity of article 128 of the constitution of the State of Louisiana, which is in these words as published, viz, "Art. 128. Contracts for the

sale of persons are null and void; and shall not be enforced by the courts of this State," on the ground that the said article impaired the obligation of contracts and violated section ten of article one of the Constitution of the United States, and the decision of the said supreme court of Louisiana, being the highest court in which a decision in said suit could be had, sustained the validity of said article No. 128, and rendered final judgment on said ground against petitioner's right to recover as executor of said Palmer, deceased, on said promissory note as holder.

35 Petitioner feels himself aggrieved by said judgment, and desires to be allowed to bring the said decision of said supreme court of Louisiana before the Supreme Court of the United States, for reëxamination by a writ of error, under the 25 section of the judiciary act, &c.

Wherefore petitioner prays that your honor will allow a writ of error to issue in said case in favor of petitioner, as executor as aforesaid, against said Henry Marston, and that your honor will fix the amount of the bond and approve the same and sign the citation in error, and for general relief.

By RACE, FOSTER, &
E. T. MERRICK,
*Att'ys for Petitioner.*

I allow the writ of error herein prayed.
(Signed) JOS. P. BRADLEY,
*Asso. Justice Sup. Court U. S.*

AUG. 5TH, 1870.

Filed Nov. 16th, 1870.
(Signed) M. P. JULIAN,
*Dep'y Clerk Sup. Court State of La.*

36 *Bond.*

JOHN D. WORTHY, EX'R OF, &C.,
*vs.*
HENRY MARSTON.

Filed Nov. 16th, 1870.
(Signed) M. P. JULIAN,
*Dep'y Clerk.*

**Supreme Court of the United States.**

Know all men by these presents that we, John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the parish of East Feliciana, in said State, deceased, as principal, and Geo. W. Race, William H. Foster, and Edwin T. Merrick, as sureties, are held and firmly bound unto Henry Marston, of said parish of East Feliciana, in the sum of one thousand dollars, to be paid to the said Henry Marston, his executors and administrators, to which payment we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this thirteenth day of July, A. D. 1870.

Whereas the above-bounden John D. Worthy, as executor of the
37 last will and testament of Archibald D. Palmer, deceased, hath

prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the supreme court of the State of Louisiana, in the suit of said John D. Worthy, executor, against said Henry Marston, said suit being originally entitled A. D. Palmer vs. Henry Marston:

Now, therefore, the condition of this obligation is such, that if the above-named John D. Worthy, as executor, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Sign'd) JOHN D. WORTHY, *Ex'r*,
p'r E. T. MERRICK. [SEAL.]
(Sign'd) G. W. RACE. [SEAL.]
(Sig'd) W. H. FOSTER. [SEAL.]
(Sig'd) E. T. MERRICK. [SEAL.]

Sealed and delivered in the presence of—
(Signed) JAMES M. HARDING.

I approve the foregoing bond.
(Signed) JOSEPH P. BRADLEY,
*Associate Justice of Sup. Court U. S.*

AUG. 5TH, 1870.

*Citation.*

JOHN D. WORTHY, EX'R OF, &C.,
*vs.*
HENRY MARSTON.

38 THE UNITED STATES OF AMERICA,
*District of Louisiana:*

The President of the United States to Henry Marston, of the parish of East Feliciana and State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Louisiana for appeals, returnable at the city of New Orleans, in said State, wherein John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the said parish of East Feliciana, deceased, as executor, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] JOSEPH P. BRADLEY,
*Associate Justice Sup. Court U. States.*

39 (Indorsed:) United States circuit court. No. . John D. Worthy, ex'r, vs. Henry Marston. Citation. Filed Nov. 16th, 1870. M. P. Julian, dep'y clerk sup. court State of La.

This is to certify that I this day served a duplicate copy of this citation in error upon Henry Marston in person, in the town of Clinton, parish of East Feliciana, and State of Louisiana, by delivering the same to him in person.

November 12th, 1870.

D. C. HARDEE.

STATE OF LOUISIANA,
*Parish of East Feliciana:*

Personally came and appeared before the undersigned authority D. C. Hardee, who being duly sworn according to law, deposeth and says that the above service was truly made by him on the day and in the manner stated; that he did deliver a duplicate copy of this citation or writ of error to Henry Marston, in person, in the town of Clinton, parish of East Feliciana, and State of Louisiana, on said 12th day of November, as above stated.

This 12 day of November, 1870.

D. C. HARDEE.

Sworn to & subscribed before me this 12th November, 1870.

C. F. HUSTON,
*Clerk 5th Dist. Court.*

40 THE UNITED STATES OF AMERICA,
*District of Louisiana:*

The President of the United States to Henry Marston, of the parish of East Feliciana and State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana for appeals, returnable at the city of New Orleans, in said State, wherein John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the said parish of East Feliciana, deceased, as executor, is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifth day of August, in the
41 year of our Lord one thousand eight hundred and seventy.

(Signed) JOSEPH P. BRADLEY,
*Associate Justice Sup. Court U. States.*

*Sheriff's return.*

This is to certify that I this day served a duplicate copy of this citation in error upon Henry Marston in person, in the town of Clinton, parish of East Feliciana, and State of Louisiana, by delivering the same to him in person.

November 12th, 1870.

(Signed) D. C. HARDEE.

*Oath.*

STATE OF LOUISIANA,
*Parish of East Feliciana:*

Personally came and appeared before the undersigned authority D. C. Hardee, who being duly sworn according to law, deposith and says that the above service was truly made by him on the day and in the manner stated; that he did deliver a duplicate copy of this citation or writ of error to Henry Marston in person in the town of Clinton,
42 parish of East Feliciana, and State of Louisiana, on said 12th day of November, as above stated. This 12th day of November, 1870.

(Signed) D. C. HARDEE.

Sworn to and subscribed before me this 12th November, 1870.
[SEAL.] C. W. HUSTON,
*Clerk 5th District Court.*

Filed November 16th, 1870.
(Signed) M. P. JULIAN,
*Dep'y Cl'k Sup. Court State of La.*

43 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of Louisiana, greeting:

Because in the record and procedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the parish of East Feliciana, deceased, plaintiff, as executor, and Henry Marston, defendant, wherein was drawn in question the validity of a statute of the State of Louisiana on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said John D. Worthy, executor, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] D. URBAN,
*Clerk of the United States Circuit Court for the District of Louisiana.*

44 (Indorsed:) United States circuit court. No. . John D. Worthy, ex'r, plaintiff in error, versus Henry Marston. Writ of error.

This writ of error is allowed.

JOSEPH P. BRADLEY,
*Asso. Justice Sup. C't U. S.*

Filed Nov. 16th, 1870.

M. P. JULIAN,
*Dep'y Clerk Sup. Court State of La.*

45 *Certificate.*

UNITED STATES OF AMERICA:

Supr'me court of the State of La.

In pursuance of the writ of error hereto annexed, I, M. P. Julian, dep'y clerk of said supreme court of the State of Louisiana, the clerk of the same court being absent from the State, do hereby certify that the foregoing forty pages contain a true and complete copy of the transcript of the proceedings had in the 5th district court of the parish of East Feliciana, State of La., originally entitled A. D. Palmer vs. Henry Marston, and of the record of the same case before the supreme court of the State of Louisiana, wherein John D. Worthy, as executor of Archibald D. Palmer, dec'd, is plaintiff, and Henry Marston defendant, and of all the proceedings had in, and the final judgment rendered by, the said supreme court of the State of Louisiana on the appeal taken by said John D. Worthy, executor, against said Henry Marston, defendant, as fully as the same stand of record in said court.

46 In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 17th day of November, anno Domini 1870, and in the ninety-fifth year of the independence of the U. S. of America.

[SEAL.]

M. P. JULIAN,
*Dep'y Clerk.*

47 To the Hon. Joseph P. Bradley, associate justice of the Supreme Court of the United States:

The petition of John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the parish of East Feliciana, and State of Louisiana, deceased, respectfully represents that in the case originally entitled A. D. Palmer vs. Henry Marston, and bearing the No. 2118 on the docket of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, and brought upon a promissory note for $ and interest, signed by said Henry Marston, and made payable to , and indorsed and held by said A. D. Palmer, deceased, there was drawn in question the validity of article 128 of the constitution of the State of Louisiana, which is in these words, as published, viz: "Art. 128. Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State," on the ground that the said article impaired the obligation of contracts and violated section ten of article one of the Constitution of the United States, and the decision of the said supreme court of Louisiana, being the highest court in which a decision in said suit could be had, sustained

the validity of said article No. 128, and rendered final judgment on said ground against petitioner's right to recover as executor of said
48 Palmer, deceased, on said promissory note, as holder.

Petitioner feels himself aggrieved by said judgment, and desires to be allowed to bring the said decision of said supreme court of Louisiana before the Supreme Court of the United States for reëxamination by a writ of error, under the 25 section of the judiciary act, &c.

Wherefore petitioner prays that your honor will allow a writ of error to issue in said case in favor of petitioner, as executor as aforesaid, against said Henry Marston, and that your honor will fix the amount of the bond and approve the same, and sign the citation in error and for general relief.

By RACE, FOSTER, &
E. T. MERRICK,
*Att'ys for Petitioner.*

49 (Indorsed:) John D. Worthy, ex'r, vs. Henry Marston. Petition for the allowance of a writ of error.

I allow the writ of error herein prayed.

JOSEPH P. BRADLEY,
*Asso. Justice Sup. Ct. U. S.*

AUG. 5, 1870.

Filed Nov. 16th, 1870.

M. P. JULIAN,
*Dep'y Clerk Sup. Court State of La.*

50 Supreme Court of the United States.

Know all men by these presents that we, John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the parish of East Feliciana, in said State, deceased, as principal, and George W. Race, William H. Foster, and Edwin T. Merrick, as sureties, are held and firmly bound unto Henry Marston, of said parish of East Feliciana, in the sum of one thousand dollars, to be paid to the said Henry Marston, his executors and administrators; to which payment we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this thirtieth day of July, A. D. 1870.

Whereas the above-bounden John D. Worthy, as executor of the last will and testament of Archibald D. Palmer, dec'd, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of Louisiana, in the suit of said John D. Worthy, executor, against said Henry Marston, said suit being originally entitled A. D. Palmer vs. Henry Marston:

51 Now, therefore, the condition of this obligation is such, that if the above-named John D. Worthy, as executor, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN D. WORTHY, *Ex'r*,
P'r E. T. MERRICK. [SEAL.]
G. W. RACE. [SEAL.]
W. H. FOSTER. [SEAL.]
E. T. MERRICK. [SEAL.]

Sealed and delivered in the presence of—
JAMES M. HARDING.

I approve the foregoing bond.

JOSEPH P. BRADLEY,
*Associate Justice of Sup. Court U. S.*

AUG. 5, 1870.

(Indorsed:) John D. Worthy, ex'r, vs. Henry Marston. Bond. Filed Nov. 16th, 1870. M. P. Julian, dep'y clerk.

(Indorsement on cover:) No. 311. John D. Worthy, ex'r of Archibald D. Palmer, dec'd, plaintiff in error, vs. Henry Marston. Louisiana sup. court. Filed 28th November, 1870.

the validity of said article No. 128, and rendered final judgment on said ground against petitioner's right to recover as executor of said
48 Palmer, deceased, on said promissory note, as holder.

Petitioner feels himself aggrieved by said judgment, and desires to be allowed to bring the said decision of said supreme court of Louisiana before the Supreme Court of the United States for reëxamination by a writ of error, under the 25 section of the judiciary act, &c.

Wherefore petitioner prays that your honor will allow a writ of error to issue in said case in favor of petitioner, as executor as aforesaid, against said Henry Marston, and that your honor will fix the amount of the bond and approve the same, and sign the citation in error and for general relief.

By RACE, FOSTER, &
E. T. MERRICK,
*Att'ys for Petitioner.*

49 (Indorsed:) John D. Worthy, ex'r, vs. Henry Marston. Petition for the allowance of a writ of error.

I allow the writ of error herein prayed.

JOSEPH P. BRADLEY,
*Asso. Justice Sup. Ct. U. S.*

AUG. 5, 1870.

Filed Nov. 16th, 1870.

M. P. JULIAN,
*Dep'y Clerk Sup. Court State of La.*

50 Supreme Court of the United States.

Know all men by these presents that we, John D. Worthy, executor of the last will and testament of Archibald D. Palmer, late of the parish of East Feliciana, in said State, deceased, as principal, and George W. Race, William H. Foster, and Edwin T. Merrick, as sureties, are held and firmly bound unto Henry Marston, of said parish of East Feliciana, in the sum of one thousand dollars, to be paid to the said Henry Marston, his executors and administrators; to which payment we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this thirtieth day of July, A. D. 1870.

Whereas the above-bounden John D. Worthy, as executor of the last will and testament of Archibald D. Palmer, dec'd, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of Louisiana, in the suit of said John D. Worthy, executor, against said Henry Marston, said suit being originally entitled A. D. Palmer vs. Henry Marston:

51 Now, therefore, the condition of this obligation is such, that if the above-named John D. Worthy, as executor, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN D. WORTHY, *Ex'r*,
P'r E. T. MERRICK. [SEAL.]
G. W. RACE. [SEAL.]
W. H. FOSTER. [SEAL.]
E. T. MERRICK. [SEAL.]

Sealed and delivered in the presence of—
JAMES M. HARDING.

I approve the foregoing bond.

JOSEPH P. BRADLEY,
*Associate Justice of Sup. Court U. S.*

AUG. 5, 1870.

(Indorsed:) John D. Worthy, ex'r, vs. Henry Marston. Bond. Filed. Nov. 16th, 1870. M. P. Julian, dep'y clerk.

(Indorsement on cover:) No. 311. John D. Worthy, ex'r of Archibald D. Palmer, dec'd, plaintiff in error, vs. Henry Marston. Louisiana sup. court. Filed 28th November, 1870.

# ...preme Court of the United States.

...T, Plaintiff in Error

...

...ARTON, Defendant in Error.

...ROR TO THE DISTRICT COURT FOR PLAINTIFF.

W. T. MERRICK,

*of Counsel for Plaintiff.*

# Supreme Court of the United States.

JOHN D. WORTHY, PLAINTIFF IN ERROR,

*versus*

HENRY MARSTON, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFF.

Plaintiff in error states the following errors, as ground for reversal of the judgment of the Supreme Court of Louisiana, viz:

The suit is brought on a promissory note, and the said Supreme Court of the State of Louisiana erred in the judgment rendered by them against the plaintiff in error, by enforcing article No. 128 of the Constitution of said State of Louisiana, which is in these words: Article 128—"Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State;" for this: that said article No. 128 of said Constitution of said State impairs the obligation of the contract, viz. said promissory note sued on, and contravenes and violates section 10 of article 1 of the Constitution of the United States, and is it-

self null and void, and ought not to have been enforced, and judgment ought to have been rendered in plaintiff's favor.

The promissory note sued on was for sixteen hundred and eighty-seven 53-100 dollars and interest, and dated in 1863, and was acquired by plaintiff's testator, A. D. Palmer, from the payee, James O. Fuqua, a member of the bar. A payment of $1000 was made to the attorney of the estate in 1866. The balance due July 9, 1826, is in controversy, and defendant pleads, in bar of plaintiff's right of recovery, as his only defence, the following: "Further answering, specially avers that ($949 25) nine hundred and forty nine 25-100 dollars of said note is and forms part of the purchase price of an African negro claimed to be a slave, which, your respondent alleges, has been freed by the sovereign authority, and hence said obligation for said nine hundred and forty-nine 25-100 dollars is null and void."—Printed record, p. 1.

Judgment was rendered by the District Court of Louisiana, after the adoption of the Constitution of 1868, sustaining the defence.— R. p. 5; Art. Const. 153.

The judgment of the Supreme Court of Louisiana was rendered on the 28th day of March, 1870.—R. p. 11.

The error stated here was specially assigned in the record, under a formal assignment of errors, in the Supreme Court of Louisiana; nevertheless, the article

of the Constitution (128) complained of was, in fact, enforced by said Supreme Court. See assignment of errors, R. p. 9. The same question was presented a second time for the consideration of the Supreme Court of Louisiana, on a petition for a re-hearing.

Under the construction placed by this Court upon the judiciary act of 1867 in the case Stewart vs. Kahn, 11 Wal. 501, 502, the error of which we complain sufficiently appears.

In that case there was no bill of exception; no pleading setting up the statute relied on; no assignment of errors. The error was made to appear by the brief copied into the record and the petition for a re-hearing. In this the answer, the assignment of errors and the petition for a re-hearing show that the Constitution of the United States was relied on, and its force parried.

It has been pretended that the Supreme Court of Louisiana have not enforced the article 128 of the Constitution.

The appellate court always looks to what was done, and not to what was said, in revising the judgments of lower courts. The reasons may be bad and the judgment good, and courts have not time to do more than consider whether the thing done by the judge is or is not legal.

*There is no other law* under which the judgment could have been rendered than the article of the Constitution. If there is it would have been cited.

*It cannot be denied that the article of the Constitution of Louisiana (which is recognized as paramount law) has been enforced in fact and in accordance with its language;* for its precise and stringent provisions have been carried into effect to their fullest extent against a subsequent holder of a promissory note; one who had and could have had nothing to do with the original consideration for which the note was given.

And the Supreme Court of Louisiana uses, in its decision, the following language, with reference to the holder's inability to recover, viz:

"Under the rule established in the case of Groves vs. Clark, 21 An. p. 567, it is immaterial whether the plaintiff became a holder before or after maturity."—R. p. 12.

The following quotations from the case cited by the Supreme Court (Graves vs. Clark) will show that the rule invoked and enforced is article No. 128 of the Constitution. On the page cited (21 An. 567) the Supreme Court states the case of Groves vs. Clark as follows:

"The plaintiff establishes that he acquired the note on which he founds this suit before its maturity. It seems he took it in part payment of an interest of his brother, William P. Groves, in a drug store. The article 128 of the State Constitution forbids the enforcement of obligations entered into for the payment of the price of slaves. But it is contended that this provision of the State Constitution does not apply in

cases where obligations having that character and in the form of negotiable notes, are transferred before their maturity to third parties. The plaintiff alleges that he is the *bona fide* holder before maturity, and that as between himself and the maker of the note, the consideration of the note cannot be inquired into."

The Court examined the question, and says: "We hold the purpose of art. 128, of the Constitution of the State to be clear and without doubt, and that that purpose is, that the contracts which it reprobates shall be null in whose hands soever they are found, and that the courts are forbidden to enforce them, whether held by owners *bona fide* or *mala fide*, and without reference to the time they acquired them."—21 A. p. 569.

*Thus, it was this very principle, which was enforced in the case at bar.*

The act of 1867 was passed to enable this Court to judge for itself what law has been violated by the decision of the lower court, and to place it out of the power of any State tribunal to evade or defeat the jurisdiction of this Court by the mere language of the decree, and we believe no amount of verbiage or assertion can, after an examination by your Honors of the case of Groves vs. Clark, disguise or obscure the fact from your minds, that article No. 128 of the Constitution of the State of Louisiana was, in substance, tenor, language and fact, enforced in the case at bar.

We know it has been asserted that the Court, under the Constitution of 1864, in Wainwright vs. Bridges, 19 An. 231, had decided that *slave contracts were invalid.*

This is a grave mistake. In the case of Wainwright vs. Bridges only two of the judges of the Court (Justices Taliaferro and Howell) held slave contracts invalid. Chief Justice Hyman held the contract *valid*, but concluded that plaintiff's claim was repelled by the counter obligation of warranty. His language is:

"Although the amendment of the consititution emancipating slaves did, by its provisions, destroy, in some instances, liens granted to secure the enforcement of contracts relative to slaves, the conclusion is not rational, that, therefore, it destroyed the obligation of parties to such contracts.

"The language of the amendment does not show such intendment, and we are not to disregard its words to find intention different from the words. I do not find, from the words of the amendment, that the sovereign designed and intended the extraordinary deed of destroying *valid contracts.*

"The amendment only freed the servant from his master, and destroyed liens granted on him. It did not change or destroy the master's obligation under his contract.

"Plaintiff, in my opinion, would be entitled to recover *if there was no warranty in the sale.*" See 19 An. p. 240.

Justices Ilsley and Labove, by an elaborate argument, read by Judge Ilsley, held the contract valid, and that plaintiff was entitled to recover, notwithstanding the warranty. Judge Illsley said: "I am satisfied that the right of plaintiff to recover the price of slaves sold by him to the defendants is founded on law, notwithstanding the ingenious and plausible theories submitted to sustain the pretensions of defendants." 19 An. p. 299. It is therefore clear that a majority of the bench under the constitition of 1864 deemed slave contracts valid.

We do not remember any case where any other person than the *warrantor* sued on a slave contract and was defeated by that Court.

The cases are numerous where they enforced such contracts down to the adoption of the constitution of 1868.

The action of redhibition is one which grows out of the contract of sale, partaking of the nature of warranty, and which, on a tender back of the slave and a demand of rescission, authorized the vendee, in a proper case, to have the sale judicially rescinded, and the price reduced or restored, provided the action was brought within the year.

It is manifest that the price could not be recovered back, and the Court would not avoid the contract if it were illegal in its inception; yet the Supreme Court, under the constitution of 1864, repeatedly considered and enforced redhibitory actions.

In Gallier vs. Kendig, 18 An. 118, February, 1866, the Supreme Court consider the testimony, and refuse the plaintiff judgment, for insufficient proof.

In Morphy vs. Blanche, February, 1866, 18 An. 133, the price of the slave was decreed to be refunded.

In Chapman vs. Matthews, 18 An. 118, the action was maintained.

In Lynch & Wieman vs. McRae, November, 1866, 18 An. 640, sale annulled and price returned.

The same bench had, in May, 1865, considered a similar case, notwithstanding it was contended that the action was *contra bonos mores*, and affirmed the judgment of the lower court.—Huntington vs. Brown, 17 An. 48.

In Canton vs. Semmer, 17 An. 119, June, 1865, the same bench refused the plaintiff relief.

In March, 1868, just before the constitution of 1868 went into effect, the Supreme Court of Louisiana enforced another redhibitory action (McAllister vs. Freeman, 20 An. 205), and decreed a return of the price, $1800. This case is the more remarkable, as it affirms the validity of the contract by four judges, including the three judges who had declared such to be their opinion in Wainwright vs. Bridges. Mr. Justice Howell, however, dissented, thinking it in conflict with the jurisprudence on the subject. "to the effect that the price and value of a slave cannot be enforced, and no warranty exists." He adds. "If the price cannot be recovered by the vendee, the *vendor* cannot be

compelled to *return* the price. The two actions rest upon the same principle, and neither can be maintained. I think the plaintiff's demand, which rests upon the right of warranty, should be dismissed."

In the case of the Canal Bank vs. Templeton, 20 An. 143, decided in February, 1868, the Court say: "We are satisfied from the evidence in the record, which is not rebutted, that the plaintiff is the *bona fide* holder of the note sued on, and transferred to it previous to their maturity for a good consideration, without notice, and that no want of consideration, *even by the emancipation of slaves* or otherwise, between the original parties, can be urged against the plaintiff."

While a majority of the Supreme Court held slave contracts valid, and the doctrine of Wainwright vs. Bridges had failed to receive the approbation of the bar, it was important for all those who wished to relieve the citizens of Louisiana, as much as possible, from the burden of their debts, to get article 128 incorporated into the constitution.

In view of these facts, it is difficult to reply in measured language to the assumptions of those who assert that there is some other law on this subject, in force in Louisiana and that the courts are not enforcing article 128 of the constitution, when they are carrying its precise provisions into effect

*Courts do not make laws;* and our adversaries, after having relied on article 128 in the court below, in their

brief, will please tell us what law it was the Supreme Court of Louisiana enforced in Groves vs. Clark, 21 An. 567, as decisive of this case, and what other law of Louisiana there is prohibiting slave contracts besides article No. 128 of the constitution.

If *the principle of this article* of the constitution of Louisiana, is considered by our adversaries and the Supreme Court of the State as the law of Louisiana, it has been, without reference to terms, carried into effect in the judgment in this case. If so, it will be difficult to show that a *provision of law* declared by the highest legislative authority in the State is not law, but that the *principle* of the same is law, and may be invoked and enforced without enforcing the law itself.

But what is the object of this refinement in distinctions? It is difficult to imagine any other than to prevent a revision of the question by this Court. The article 128 stands directly in the way of our recovery, and we have no doubt it will be considered by this Honorable Court, and set aside or enforced.

On the merits of the case, we purpose to be brief. We have been informed that cases involving the question have been elaborately argued, and are under consideration; and we do not suppose that we can add anything new. The answer of defendant pleads payment to plaintiff of $1,000, which admits plaintiff's title as holder of an obligation payable to J. O. Fuqua, and sets up the defence that the price of a slave, to the extent of $949 25, is the residue of the considera-

tion of the note. It is not pretended that either Fuqua or Palmer sold the slave, but that Fuqua acquired the slave notes against Marston, and that said slave notes entered into and formed a part of the consideration of the note sued on. The plaintiff is not therefore in any manner chargeable with any complicity in the sale of the slaves made by the public authority at the probate sale of Mayes' estate, and the question is raised by the record, whether article 128 of the Constitution of Louisiana does not impair the obligation of contracts and contravene sec. 10 and art. 1 of the Constitution of the United States.—1 Black, 436.

Slaves were recognised as property in 1855, when the notes to Mayes' estate were given.

Marston, the purchaser of the slave at the probate sale, became the owner of him. This right of ownership, which implies the right to sell, also entitled him to the labor of the negro—the right to sue for him, and claim him in the hands of any one who might seek to deprive him of his possession—to revendicate him as property everywhere. No other person had this right, after it had been acquired from the Mayes' estate. It was then like any other acquisition in ownership The risk of loss was in the owner, as in any other case. He ran the risk of escape, of sickness, of wrongful possession by others, of death, and of emancipation by the civil authorities.

The only question is, was the contract lawful when made, and did the defendant receive value for it?

If he did, the subsequent emancipation of the slave did not relieve him from his obligation; for every purchaser knew, when he bonght slaves, that it was in the power of the Government to set them free. And in modern times, this was no uncommon act, as the history of these States, of the British colonies and of Russia has shown.

The vendor, therefore, could not have been supposed to warrant against the right of eminent domain in a slave, any more than he would have done in real estate or movables; and the maxim, *res periit domino*, was alike applicable to each. If a portion of the real estate was carried into the river; if a house was burnt; if personal effects were stolen, confiscated, or taken for public use, the loss fell upon the purchaser, the man who bore the relation of owner to the thing or real estate—*res periit domino;* and the same principle was applicable to the ownership of the services of slaves.

Now, if the owner, the man who alone of all others could claim the services of the slave, and revendicate him if taken away, has lost his slave by some action of the Government, he has so lost him either on account of some improper conduct on his part, and the slave has been rightfully emancipated and taken away from him, or he is innocent, and been wrongfully deprived of his slave.

If he has been deprived of the services of the slave on account of his own wrongful acts, it is manifest such

acts ought not to prejudice third persons, nor relieve him from his obligations towards them.

If, on the contrary, he is innocent, and been wrongfully deprived of the services of his negro, then his remedy is against the Government; for he alone, as owner, can claim the value of his services, and compensation must be made to him.

Holding such relation to the emancipated slave, as the owner did at the date of emancipation, (after, perhaps, selling the slave himself or enjoying his services for years,) he ought not to be heard to say that the contract by which he bought was unlawful, and that he was never bound, especially as section 2 of article 4 of the Constitution of the United States then recognised such right, and laws of Congress, as well as the State whereof such person was citizen, also recognised such right.

As it respects the effect of an act of Parliament on executory contracts in the English Courts, it is not applicable to the case at bar; for by the English law, complete performance is necessary to entitle a party to recover. No apportionment in such contracts is allowed. Hence, whether arrested in the execution of a contract by overpowering force, or an act of Parliament, there is no difference. Parties cannot recover, for they have not fully performed. But as it respects executed contracts, the English Courts enforce obligations arising from acts contravening the rights of the owners of slaves.—Medrazza vs. Willis, 3 B. & A. 352, 5 Eng. Com. Law Rep.

See also West vs. Hall, 64 N. C. Rep.; Greenwood vs. Curtis, 6 Mass. 358.

In the case of Gaines vs. De la Croix, 6 Wallace, 719, we have been been informed by counsel that the objections set up by opponents were urged orally in that case. At all events, this Court ordered a reference to a master, to take account of slaves illegally sold.

The large amount of debts owing by the people of Louisiana at the close of the war, (much of which was held abroad,) made it important to lessen their liability as much as possible. How effectually they have done what was desirable in this regard, may be inferred from the prohibitions against recovery on slave contracts or contracts for Confederate money, and the rigid enforcement of the laws of prescription.

Sec. 4 of 14th amendment was not intended to affect executed contracts already made between private persons. It prohibited the United States and the several States from paying any *claim* for the loss or emancipation of any slaves; debts or obligations incurred in aid of insurrection and rebellion, as well as claims for the loss of slaves by emancipation, are held illegal and void. The provision seems based on the assumption that the people holding slaves during the war, were deprived of them on account of their, the holders' own conduct.

E. T. MERRICK,
of Counsel for Plaintiff.

## ADDENDA.

The constitution of Louisiana of 1868 went into effect, as to its general provisions, on its adoption in April, 1868. The government under the constitution was in full operation on the 29th day of June of that year. The Legislature ratified the 14th amendment to the constitution, and the act of ratification was approved by Gov. Warmoth on the 9th of July, 1868. See Acts of the La. Leg. 1868, p. 4; Const. of La. (found in same volume), arts. 152, 153, 154, 157, 158, 159.

The Supreme Court of Louisiana has not only enforced article 128 in the case at bar, but it has enforced the same with unusual rigor. In Sandidge vs. Sanderson, 21 An. 757, that Court held that payments on obligations given as the price of *slaves* and *land* should be applied generally to the whole consideration. That the remainder due should be recoverable according to the proportion which the price of the land bore to the price of the slaves. Had this principle, which was invoked, been applied to the case, and art. 128 enforced only against so much of the price of the slave notes of 1855 as had been carried into the note in controversy, there must have been judgment in plaintiff's favor for $467 54, with interest from July 9, 1866. But instead of this, the force of article 128 was allowed

to *defeat the whole note*, through the authority of the case of Groves vs. Clark, 21 An.

The obligation sued on is simply a promissory note. It was, therefore, given because the agreement on which it was given was *executed* on the part of the payee; and nothing more was contemplated by the parties than payment by the maker. The law, as it respects executory contracts therefore, seems to plaintiff's counsel inapplicable; for everything has been done which was expected to be done by the payee. Marston had received the slave from May's estate eight years previously. The sale invested him with all the title he expected, and at the time, knowing the instability of the tenure of slave property, he gave his notes for the price, and when those notes were subsequently surrendered to him, he gave the notes in controversy for the balance due on them, and including also in the same the residue of his indebtedness to Fuqua.

# Supreme Court of the United States.

JOHN D. WORTHY, EXECUTOR OF PALMER, PLAINTIFF IN ERROR,

*versus*

HENRY MARSTON, DEFENDANT IN ERROR.

PLAINTIFF'S SUPPLEMENTAL ARGUMENT AND REPLY.

This case involves a *question* of constitutional law *not presented*, as far as we know, in any of the other cases before this Court. It arises from the difference ~~in~~ the other cases in these three particulars, viz:

1st. Neither the payee of the promissory note nor the subsequent holders ever owned the slave forming a part consideration of the note, the defendant alone having had ownership in the negro.

2d. The article 128 of the constitution of Louisiana has been enforced in this case, so as to impair the *whole* obligation, although the answer does not pretend that any more than $945 28 of the consideration had its origin in the price of a slave.

3d. As the law of the contract is a part of the contract itself, the contract has provided for the special case before the Court, as much so as if it had been

written in the promissory note, that the future emancipation of the slave should not be deemed a failure of consideration. See Civil Code of Louisian,a art. 1892.

Bearing these differences in view, we will proceed to consider some of defendant's objections.

His remarks upon the case of Stewart vs. Kahn, instead of proving the authority of that case to be inapplicable to this case, proves that it is directly in point; for the promissory note sued on having been given to a payee who never owned the slave, a portion of whose price formed a part of the consideration of the note sued on, the subsequent holder had nothing to do, under any system of laws with which we are familiar, but to bring the ordinary action, and the plea contained in the answer, that a portion of a price of a slave forming a part of the consideration of the promissory note vitiated the note *in toto*, required, under the law of Louisiana no replication in writing, and hence, when the article 128 of the constitution of Louisiana, was sought to be enforced to impair the obligation of the promissory note received by the payee and subsequent holders in good faith, it was sufficient to raise the question in the way permitted by the laws of Louisiana.

Under the old judiciary act, it was necessary that the question should have been raised in a formal manner on the record, by the pleadings or by bill of exception, to give this Court jurisdiction; but under the present act it is sufficient to maintain the jurisdiction of this Court, as has been well settled in the case of Stewart vs. Kahn, that question was raised and de-

cided against the constitution, laws and treaties of the United States. That such has been the case in the present suit, no candid mind can doubt.

The object of the new law, in enlarging the jurisdiction of this Court, was to prevent the inferior courts, by any kind of evasion, from preventing the suitor from bringing his suit before this Court. The constitution of the United States grants the right, and Congress has taken care that this right shall not be defeated by any sort of subterfuge or evasion.

We have demonstrated in the former brief that only a minority of the bench which decided Wainwright vs. Bridges held slave contracts *illegal* (if the term pleases our adversary better than invalid), and that that bench would have been compelled, under their decisions, to have given judgment in this case in our favor, for *Fuqua* was never bound in warranty to Marston, and there was no reciprocal obligation between him, or the holder of the note, and Marston. Nothing but the imperious provisions of article 128 of the Louisiana constitution could bar the recovery.

In view of this fact, and the decision in Canal Bank vs. Templeton, 20 An. 141; Graves vs. Clark and Armstrong vs. Lecomte, 21 An. 528, plaintiff's counsel had a right to expect that the issue would have been as fairly met as in the two last mentioned cases. In Armstrong vs. Lecomte, the Supreme Court of Louisiana consider whether a third holder for value can recover on a note given as the price of a slave. The Court says:

"Article 128 of the State constitution says contracts

for the sale of persons are null and void, and shall not be enforced by the Courts of this State.

"The language is full, plain and comprehensive, including all contracts for the sale of persons. There is no limitation, no modification, no reservation, in favor of those who were not originally parties to the contracts. * * * The very declaration that all contracts for the sale of persons are null and void, reveals the scope of the article, and leaves no room for construction, *and the prohibition allows no option to the courts*, when it is shown that the contract sought to be enforced, whether by the vendor, his endorsee, or other party, is one for the sale of persons."

The defendant, to avoid the effect of the decision of the Supreme Court of Louisiana in this case, where they enforce the article 128 of the constitution of Louisiana through the doctrine of Graves vs. Clark, 21 An. p. 567, calls the important citation an "*obiter dictum.*" He says "*error of fact* results from an obiter dictum of the Supreme Court of Louisiana in their decision in this case."

And then he endeavors to show that the Supreme Court of Louisiana were laboring under an error of fact, and ought not have to enforced the article in the manner in which they did, because the note in controversy was transferred by Fuqua "without recourse."

Probably the Supreme Court of Louisiana were not ready to decide that the taking of a note without recourse made the holder chargeable with notice of equities. At all events, the Supreme Court did not find

that Palmer was subject to the equities which existed between Marston and Mayes' estate, on a contract made *eight* years previously to the giving of the note in question. As Fuqua parted with his money, or at least professional services, when he gave up the notes against the Mayes estate to Marston, and as he was a third person as it respected that contract, the Supreme Court of Louisiana might well pause before they held that, by the remotest possibility the case of Wainwright vs. Bridges could apply to this case.

After the defendant had relied on article 128 of the Louisiana constitution before the Supreme Court of Louisiana, as he did in his printed argument, we do not think he is entitled to much credit for his candor in the reluctant admission, that an error of fact results from an obiter dictum of the Supreme Court of Louisiana, in enforcing the article 128 of the constitution of the State in this case through the authority of Graves vs. Clark. *We say that the article in question* has not only been applied to us as subsequent holders, but it has been applied to cut up the whole obligation, root and branch, and this would have been boldly confessed everywhere, were it not for the revising power of this Court, which there has been such studious attempts to avoid.

I. Defendant in his argument, in substance, assumes that the government has destroyed the consideration for which the note was given, and that therefore the plaintiff is restrained from obtianing and the Court from granting a judicial remedy.

At the time Henry Marston gave the note in ques-

for the sale of persons are null and void, and shall not be enforced by the Courts of this State.

"The language is full, plain and comprehensive, including all contracts for the sale of persons. There is no limitation, no modification, no reservation, in favor of those who were not originally parties to the contracts. * * * The very declaration that all contracts for the sale of persons are null and void, reveals the scope of the article, and leaves no room for construction, *and the prohibition allows no option to the courts*, when it is shown that the contract sought to be enforced, whether by the vendor, his endorsee, or other party, is one for the sale of persons."

The defendant, to avoid the effect of the decision of the Supreme Court of Louisiana in this case, where they enforce the article 128 of the constitution of Louisiana through the doctrine of Graves vs. Clark, 21 An. p. 567, calls the important citation an "*obiter dictum.*" He says "*error of fact* results from an obiter dictum of the Supreme Court of Louisiana in their decision in this case."

And then he endeavors to show that the Supreme Court of Louisiana were laboring under an error of fact, and ought not have to enforced the article in the manner in which they did, because the note in controversy was transferred by Fuqua "without recourse."

Probably the Supreme Court of Louisiana were not ready to decide that the taking of a note without recourse made the holder chargeable with notice of equities. At all events, the Supreme Court did not find

that Palmer was subject to the equities which existed between Marston and Mayes' estate, on a contract made *eight* years previously to the giving of the note in question. As Fuqua parted with his money, or at least professional services, when he gave up the notes against the Mayes estate to Marston, and as he was a third person as it respected that contract, the Supreme Court of Louisiana might well pause before they held that, by the remotest possibility the case of Wainwright vs. Bridges could apply to this case.

After the defendant had relied on article 128 of the Louisiana constitution before the Supreme Court of Louisiana, as he did in his printed argument, we do not think he is entitled to much credit for his candor in the reluctant admission, that an error of fact results from an obiter dictum of the Supreme Court of Louisiana, in enforcing the article 128 of the constitution of the State in this case through the authority of Graves vs. Clark. *We say that the article in question* has not only been applied to us as subsequent holders, but it has been applied to cut up the whole obligation, root and branch, and this would have been boldly confessed everywhere, were it not for the revising power of this Court, which there has been such studious attempts to avoid.

I. Defendant in his argument, in substance, assumes that the government has destroyed the consideration for which the note was given, and that therefore the plaintiff is restrained from obtianing and the Court from granting a judicial remedy.

At the time Henry Marston gave the note in ques-

tion to Fuqua, he had been the debtor of the Mayes estate nearly nine years. President Lincoln's emancipation proclamation had been issued nearly one year, and Marston knew that Fuqua surrendered his recourse against the Mayes estate; and he also knew that he was the debtor of Fuqua on other accounts for $742 29; and with this knowledge, he included the whole indebtedness in one note, and promised to pay to Fuqua or order the sum of $1687 53.—P. 1, note and answer.

It is is difficult, we think, to prove that the emancipation destroyed the contract, if the Mayes estate had been the holder of the promissory note against Marston instead of the holder of commercial paper, which Marston himself had put in circulation.

For Marston was informed by his Civil Code that "Agreements legally entered into have the effect of laws on those who formed them. They cannot be revoked unless by mutual consent of the parties, or for causes acknowledged by law.

"They must be performed in good faith."

He was also bound to know, when he signed the promissory note in question and made it negotiable, as well as when he gave his commercial paper, payable to bearer, to the Mayes estate, that the article 1892 was as much a part of these several promissory notes as if it were inscribed in the face of each, and that this article declared that the subsequent failure of consideration does not affect a contract if all is done that was intended by the parties at the time.

It is in these words:

"Where the consideration or cause of the contract really exists AT THE TIME OF MAKING IT, but afterwards fails, it will not affect the contract *if all that was intended by the parties be carried into effect at the time.* The destruction of the property sold after the sale is perfected, *without the fault of the seller*, is a case governed by this rule."

Marston received from the Mayes estate all that was intended by the parties or expected by him. Else he would not have, eight or nine years afterwards, given his note to Fuqua including the balance of his former notes.

The consideration passed at the time the Mayes estate delivered the negro to Marston, and the Mayes estate at that time was divested of just so much wealth, as the negro would have commanded in value, and that was just the price Marston paid for him. The Mayes estate was impoverished at that time, and Marston made rich by the value of the slave.

Emancipation has not destroyed such consideration.

What did Marston get by his purchase in 1855? It was simply the right to the possession and services of the slave, and this right, so far as its value in market was concerned, was made up in a large measure of the hope that the negro would remain in a condition to serve; that he would not probably run away, because he had never absented himself from labor; that he would not probably get drunk, because he was temperate; that he would not probably be detained in prison, because he was not addicted to theft; that he would not soon get sick, because he was healthy; that he

would not probably become a cripple, because he was circumspect; and that he would not probably die soon, because he was robust and not advanced in years; and that he would not probably be emancipated, because slavery was guaranteed by the laws. The value of the slave consisted in the hope that he would live long and have capacity to labor. All these probabilities and hopes formed a part of the consideration, and lent the major value to the consideration embodied in the note. A subsequent disappointment in one of these hopes did not destroy the consideration, for that was real at the time it was given, and Marston agreed to give, when he signed the promissory note, but its market value, for all these hopes and probabilities attaching to his purchase. Hundreds of others would have given at that time the same that Marston gave for the right he acquired thus made up of hopes and probabilities. He took from the Mayes estate, under a public sale, that which was valuable, and that which others stood ready to give, and receiving all that was intended, the law expressly bound him to perform his promise in good faith, although he might be deprived of the slave by emancipation, which was at his risk.

In view of the positive provision of article 1892 of the Civil Code, it does not seem necessary to consider the question of whether warranty could repel the *vendor* from recovering the price of a slave after emancipation. Even this point, were it applicable to third parties, cannot avail defendant, as will be seen by the authorities, which we proceed to cite.

The taking land for public use gives no right to an

action of warranty, as has been well settled by the Supreme Court of Louisiana.—Ollie vs. Ogilvie, 13 La. Rep. 473. The same court has laid down the true rule for this case. It says the taking of land for widening a public road is not such an eviction by a superior title, against which the vendor is presumed to warrant. It as an eviction by the act of the sovereign, and the sovereign alone is to make indemnity, where indemnity is due."—Bouny vs. Niles, 6 An. 77.

"The act of the sovereign," says Merlin, "is considered, as it respects individuals (private persons), as a fortuitous event, or overpowering force, (vis major) which no one can foresee or prevent. It is for this reason that no one is, in law, bound in warranty on account of it. Warranty is only binding for the act of the sovereign where it is expressly stipulated."—Merlin Repertoire, verbo Fait du Soverain, in extenso.

Troplong says, in his work on Sale, No. 423, "But in all other cases the eviction, which has its inception after the execution of the contract, is set down to the account of the purchaser. Thus, if my property is expropriated on account of public utility, and in virtue of measures of public administration decreed after your sale to me, I have no remedy against you."

Troplong supports the above by citations of cases v. loco citato. Indeed, the civilians furnish abundant authority on this point. Several of them are collected in the very able opinion of Judge Illsley in Wainwright vs. Bridges, 19 An. 244. We doubt not the common law respecting real estate is the same as the civil law on this subject. In Ellis vs. Welch, 6 Mass.

250, Chief Justice Parsons says: "All deeds are to be construed agreeably to the intent of the parties, and in a lease or conveyance containing a general covenant for quiet enjoyment, it must be presumed that the parties had in view evictions, entries or disturbances to be made by virtue only of existing rights, and not of rights afterwards to be acquired; for these it can not be presumed, from the general words of the covenant were contemplated. Now, the interruption complained of is an easement acquired by the public after the execution of the lease. *And the authority of the selectmen to locate and establish the town-way when necessary cannot be considered as an existing encumbrance.* Neither can the prerogative of the public to convenient ways on the lands of individuals be deemed an existing right within the intention of the parties to the lease; for the lessor holds his land subject to this prerogative, and so also do the lessees their term, because it is one of the incidents of the tenure by which all the lands in the State are holden. A covenant against the *exercise of this prerogative* would be a covenant not against *any existing right or interest* in the land, *but against a naked possibility.*" See also Hilliard on Real Property, vol. 2, p. 374, No. 71, title by covenants, and authorities cited in note 5. See Noble vs. King & Smith, 1 H. Black. Rep. 34.

The case of Dudley vs. Folliot, 3 T. R. 584, sustains fully the same doctrine. It was a case where the covenant against the interruption of *any person whomsoever* was held not to bind the vendor in warranty against the seizure of the land by the government of

the United States, for forfeiture during the war of the revolution. See 2 Johns. R. 1; 2 Johns. R. 395, 397.

On the *precise point in question*, however, we have some common law decisions holding that the covenant of warranty that the slave sold was a slave for life, was not broken by the subsequent act of the government in emancipating the slaves. See Hand vs. Armstrong, 34 Georgia R. 369; Bass vs. Ware, 34 Geo. R. 386; Freeman vs. Bass, 34 Geo. R. 369, and Bradford vs. Jenkins, 41 Miss. R. 336; Walker vs. Gatlin, 12 Fla. R. 9; Haskill vs. Sevier, 25 Ark. 152; Fitzpatrick vs. Hearne, 44 Ala. 171.

It may, therefore, be safely assumed that there was no warranty on the part of Mr. Mayes' estate against the emancipation of the slave by sovereign authority, and it follows that there is nothing in the supposed warranty to stop Fuqua or Palmer's executor from recovering on the note.

It is only by wandering from the ancient and well-known landmarks of the law that any difficulty can be experienced on the question under consideration.

It is hardly possible to follow the defendant's counsel through the specious fallacies involved in his propositions and arguments in a printed brief, and the same must be left as it is, to the consideration of the court, unaided by counsel.

But we may be permitted to observe, that it is a fallacy to say that because Marston has no longer an action against Mr. Mayes' estate, that, therefore, he is not bound to fulfil his obligation to Fuqua and his payees. We imagine if Fuqua had sold Marston a

slave in 1855, for which Marston had paid the money and Fuqua had refused delivery, or if after delivery Marston had been evicted by a judgment under paramount title, the learned legal adviser of the defendant would have found that the action to recover from Fuqua the amount paid, had not been destroyed by emancipation, and now that he, Marston, is himself the sole debtor, Mayes' estate having, by its agents, done all that was expected or required by Marston, and having given at the date of the sale, as contemplated by art. 1892 of the Code, will find no legal bar to the demand, on account of the fact that he has no action against Mr. Mayes' estate. He has no action, because the contract was executed on the part of the estate. He had no action before emancipation, and therefore cannot complain that he has none now. It is a fallacy to assert that because slavery has ceased to be the subject of conventional obligations, it is contrary to equity and good conscience, good morals and public policy, to compel a party who has given his promissory note in part for the price of a slave, whom, perhaps, he has sold, or whose services he has enjoyed for years, or pay the same. It may well be, that executed contracts, which were lawful at one period, may give rise to compensation after such contracts are prohibited for the future by the Legislature. Take, for instance, contracts for the importation of articles during the time when free trade with foreign governments is permitted. If the contract is *executed* during the time when such trade is lawful, its being subsequently prohibited will not prevent the recovery of

money advanced or compensation due upon such executed contract. It would be diffierent, it is true, if the contract remained executory only; there, as neither party could perform, neither could recover. Other examples will readily occur to the Court, as in the case of the change of the usury laws. Crimes are prohibited, and contracts tending to their commission are refused a consideration in the courts. Yet, after a crime has been committed, a promise on the part of the criminal to make reparation to the injured would be enforced by the courts.

It is also a fallacy to say that the emancipation of the slave annulled the executed contract of sale between the last vendor and vendee or between the prior vendors and vendees of slaves. For if it be so, nothing would seem to prevent the vendees who had paid the price from recovering back what they had paid under contracts which emancipation had rescinded. And this would have occasioned a lively interchange of notes for recovery of the price of slaves which had been sold.

It is also a fallacy to affirm that the vendor contracted that the purchaser should have the labor and services of the slave during his life. The contract was simply to sell the slave, and warrant against attacks from all holding anterior claims according to the civil law, and leave the purchaser the risk of casualties and to defend himself against all other attacks, from whatever quarter they might come, and his right of warranty arose only *after eviction through such anterior and superior right*. So long as the vendor's possession

remained undisturbed, he had no action. Had he been evicted by such superior title, his action of warranty would, without doubt, have survived, and the Supreme Court of Louisiana, which had no trouble in maintaining actions of redhibition after emancipation, would have enforced this contract on like principles.

But, it is argued that the *mortgage or lien* for the price cannot be enforced for the slave, and that a contract which is void in part must be void *in toto*. It happens that there is no lien or mortgage in this case. Nothing but a simple promissory note. Nevertheless, the argument itself is only specious. For in those contracts where sums of money are secured by a mortgage, there are two obligations, one principal which is to pay the money, and the other accessory thereto. C. C. 3251, 3252. The principal obligation exists entirely independent of the accessory, and may be enforced independent of it, whether the mortgage is on the same or some other thing. The debtor cannot complain that the mortgage is not enforced against him, nor is he released because some accident has placed it out of the power of the creditor to enforce the mortgage. He ought to have paid the price at the time of sale, or in 1857, when the notes fell due, and indulgence ought not to prejudice the vendor.

II. The weight of authority, as well as the almost universal sense of the bar, is with the plaintiff.

In the following cases it has been decided that emancipation does not discharge the purchaser from

his obligation to pay the price of slaves bought prior to the emancipation.

Harrell vs. Watson, 63 N. C. 454.

Polk vs. Heirs of Ridge, 5 Cold. 384.

Thompson vs. Warren, 5 Cold. 644.

Rose vs. Pearson, 41 Ala. 687.

Matthews vs Dunbar, 3 W. Va. 138.

Williams vs. Johnson, 30 Md. 500.

Emancipation cases, 31 Texas, 504.

Mudd admr. vs. McElvain et al., 44 Ala. Rep. p. 48; 3 Law Times, May, 1870, p. 116.

In this last case it was held that the provision of the Constitution of Alabama, awarding the consideration and declaring that no action shall be maintained on contracts given for the price of slaves, was held repugnant to the Constitution of the United States.

In Roundtree vs. Baker, 52 Ill. R. 241, suit in Illinois on a writing obligatory given in 1853 for the price of a slave who was sold in Kentucky, and it was held that, as the contract was valid when and where it was made, the plaintiff could recover, and that the abolition of slavery did not affect plaintiff's right.

III. The defendant, as the main defence to the action, assumes that there is nothing in onr law having the remotest bearing upon the question before the Court, and, therefore, the case is to be controlled by equity. When we think that the defendant is the only one whose name appears on the note in controversy, whoever held the slave in bondage; that he voluntarily gave the note in commercial form to Fuqua, a third party, long afer the emancipation proclamation,

and thereby expressed his satisfaction with his original bargain, and gave currency to his paper by the form he adopted; that by cancelling the original notes, he deprived Fuqua of all recourse against the heirs of the Mayes' estate, who may have been more observant of the obligations than Marston; that if he sold the slave, he has his price in his pocket; if the slave died he was never freed by emancipation; that if the slave became decrepit, emancipation released Marston from the onerous obligation of the laws of Louisiana to maintain the slave during life; that if neither of these events happened, Marston had the labor of the slave for ten years; and when we think that Marston is now putting up the plea that the promissory note is tainted in part with the price of a slave to defeat it, for the whole amount, we cannot but wonder whether he is in earnest or whether it is only facetiously that he points to the inscription on the temple of justice, and invokes the government in such unusual strains. If he was really so much in earnest in appealing to equity, he would make a much more favorable impression, we should think, if he tendered that part of the note which cannot be traced back to a slave as a consideration.

But the case cannot so easily be withdrawn from positive law. The article of the Code cited shows that the consideration of the note exists by its positive provi-provisions, notwithstanding the subsequent events, and in such case as there is positive law on the subject, Article 21 of the Code has no application.

What is said by defendant as to ~~unsigned~~ executory obliga-

tions has no application to this case. Fuqua was not bound in warranty, and the only promise was Marston's made to Fuqua or order in commercial form. It is not pretended that the slave was not sound, and it is not pretended that the Mayes' title was not good, nor that anything more was expected or desired of the estate, as already said, than was done. The sale was, therefore, executed, on the part of the vendor, and so viewed by Marston when he took up the old notes, and included the balance in a new note to a third party.

There does not seem to us any force in the attempt to withdraw this case, from the maxim, *res perit domino*, on the ground that the negro, the object of slavery, was not destroyed by emancipation; that he still existed. The *slave*, it is clear, does not exist. Take the cases of property captured in war. It still exists though the laws of nations have operated a change of title. A ship may be driven on shore by a storm, so that she may become utteriy useless as a ship, though her materials may be useful for other purposes. In these cases, what defence would it be to a suit for the price, to say the things, the object of the sale, were not destroyed?

The learned counsel, who stood at defendant's side when his written argument was prepared, has utterly failed to *show any law* except Article 128 of the Constitution of Louisiana, which can possibly stand in the way of plaintiff's recovery. If the defendant could have found any case under the Court, which was organized under the so called Constitution of 1864,

which would cover this case, he would have cited it. The case of Wainwright vs. Bridges certainly does not, as we have shown in our original argument; for it was on the ground that the plaintiff, in that case, was bound as warrantor under a valid subsistency contract, and, therefore, on account of such contract of warranty, could not recover, that judgment was rendered for the defendant. As Fuqua was not bound in warranty, it is needless to repeat that under the authority of that case, the plaintiff in this was entitled to recover his *whole* demand; and it is the interposition of the Article 128 of the Constitution which has defeated him, as it did Groves and Armstrong, in the cases cited.

We have already said that courts do not make laws; they enforce them. Appellate courts do not inquire what has been said by inferior tribunals, but *what has been done.* This Court, therefore, when it finds that the positive provisions of Article 128 of the Constitution of Louisiana has been stringently enforced against the holder of a promissory note, to impair its obligation, both for that portion of the consideration which was traceable to the price of a slave, and to that portion which had orignated from other valid indebtedness, we think will not hesitate to see what was done, and enquire whether it is, or is not, in violation of the Constitution of the United States. It will never countenance, we believe, any attempt to avoid the effect of a solemn law passed by the highest authority in the State under a pretence that such permanent law was not being enforced, when it was, in truth and

in fact, carried into effect with the greatest rigor. We feel no apprehension that the appeals made by this defendant (who is endeavoring to escape from a just debt) will move the Court from a dispassionate view of the Constitutional question involved in this record; and if Article 128 of the Constitution of Louisiana has *really been inforced in the case at bar*, we have the firm belief it will be so considered without regard to what has been said.

E. T. MERRICK,
*for Plaintiff.*

# SUPREME COURT of the UNITED STATES

## No. 811

JOHN D. WORTHY, EXECUTOR OF ARCHIBALD D. PALMER, DECEASED, PLAINTIFF IN ERROR.

*Versus*

HENRY MARSTON.

In Error to the Supreme Court of the State of Louisiana.

In support of the motion heretofore filed, to dismiss the writ of error sued out in this case, for want of jurisdiction in this Honorable Court, the defendant proposes to call the attention of your Honors to some errors of fact into which the plaintiff in error has fallen, (as we think,) doubtless, unintentional.

1st. In the assignment of errors, on page 9 of the printed record, the following statement occurs:

"2. That the lower Court also erred in holding that Article 128 of the Constitution of Louisiana of 1868, in the words 'contracts for sale of persons are null and void, and shall not be enforced by the courts of this State' operating upon past contracts, was valid," &c.

May it please pour Honors: By turning to page 3 of the printed record, it will be seen, that the whole of the above statement is in direct conflict with the record.

So far from the Judge of the District Court "*holding*" as above stated. there is not only *no* allusion to the 128th Article of Constitution of 1868, but the Judge, in the reasons which he gives for his judgment, expressly refers to the case of Wainright vs. Bridges, (the first and leading case upon the liability of debtors to pay the unpaid price of slaves after emancipation,) "*and other cases.*"

2. An error of fact results from an *Obiter dictum* of the Supreme Court of Louisiana, in their decision of this case. On page 4 of the plaintiff's brief, the following quotation is made, viz:

"Under the rule established in the case of Groves vs. Clark, 21 An., page 567, it is immaterial whether the plaintiff became a holder before or after maturity."

May it please your Honors: By turning to page 3 of the printed record, the following evidence will be found, being the answer of the witness J. O. Fuqua, to the 4th interrogatory, viz:

"This note was transferred by me, *without recourse* and after maturity, to Col. D. C. Hardee, who represented himself as the plaintiff's agent, and as acting for him in this matter."

Thus, it will be seen that the case of Wainright vs Bridges, and other subsequent cases, which settled the jurisprudence of the State, applied, with the full force of application, to the facts of this case, and were decisive of the question before the Court, in the case at bar, and which had been so repeatedly decided by the Courts of Louisiana, before the adoption of the Constitution of 1868.

We therefore submit, most respectfully, that the able and ingenious analysis of the case of Groves vs. Clark, and the comments thereon by the plaintiff's counsel, are delusive, and that the following proposition *emphatically* stated, viz: "*That it was this very principle,*" (the principle embodied in Article 128 of the Constitution,) "*which was enforced in the case at bar,*" IS ERRONEOUS.

Under the settled jurisprudence of the State, the case before your Honors could not have been otherwise decided, with or without reference to the 128th Article of the Constitution.

True it is, that the decision is in *harmony* with the article referred to, *because* the article is *itself* in harmony with the jurisprudence of the State, as settled *before* the adoption of the Constitution.

On page 3 of the plaintiff's brief, the following statement occurs, viz: "*There is no other law* under which the judgment could have been rendered, than the article of the Constitution. If there is, it would have been cited."

In the case of Wainright vs. Bridges, the leading case upon the question, the 21st Article of the Civil Code was cited. We think the decision was in strict accordance with the authority therein confered upon the Courts of Louisiana. To which we beg leave to add, that it was in strict accordance with the settled jurisprudence of England upon questions arising under acts of Parliament, which interfere with private contracts. Of course, no question of such a character could ever arise under a civil administration of the governments, (State or Federal,) of the United States, because, by express provisions of the American Constitutions, legislative power is expressly inhibited from passing laws which destroy vested rights or impair the obligation of contracts.' Hence, no "*express law,*" nor precedent, could possibly be found in American jurisprudence having the remotest bearing upon the question which the Court was called upon to decide in the case of Wainright. But under the English system of government, where Parliament is restrained by no constitution, precedents are numerous, in which questions similar in principle to those arising under the acts of emancipation by the sovereign authority in the United States, have been passed upon by the English Courts.

Under these precedents the following legal proprosition will be found to be fully sustained:

"TO MAKE A PART OF A CONTRACT ILLEGAL IS TO DISSOLVE IT.

"Now when, by the act of the sovereign, law-making power, a part of the contract is destroyed, or the obligations of it become illegal, and thereby impossible of enforcement *the said contract is dissolved*, as is shown by reason and common sense, as well as numerous and undisputed English and French authorities, some of which I will now cite.

"Lord Ellenboroug, in the case of Atkinson vs. Ritchie, (10 East., 530,) says it is a proposition 'which admits of no doubt,' that 'no contract can properly be carried into effect * * which being made consistently with the rules of law at the time, has become illegal, in virtue of some subsequent law.' 'Neither can it be questioned that if * * contracts, which were fairly and lawfully made at the time, have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his sovereign, and the State of which he is a member, the non-performance is not only excusable, but a matter of peremptory duty—an obligation on the part of the subject.'

"In the case of Barker vs. Hodgson, (3 M. & Sel., 267,) Lord Ellenborough, speaking of one of the covenants of the contract, said: 'If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been *dissolved* on both sides.' The same prin-

ciple was recognized in Touting et als. vs. Hubbard, (3 B. and P. 296,) by Lord C. J. Alvanley. Also in Evans vs. Hutton, (4 Man. and Gran.,) by Lord C. J. Tyndal.

"So in Melville vs. De Wolf, (1 Jur. N. S. 758,) where the Government actually prevented one of the parties from performing his obligations under the contract, the Court said 'the contract must be considered as *dissolved* by the supreme authority of the State, which was binding on both parties.'

"Lord C. J. Abbott, in his work on shipping, (p. 596,) states the principle as follows: 'If an agreement be made to do an act, lawful at the time of such agreement, but afterwards and before the performance of the act, *the performance be rendered unlawful* by the Government of the country, *the agreement is absolutely dissolved*'"

To the above authorities may be added the following *French authority.*

On page 6 of the plaintiff's brief, the following expression occurs:

"In the case of Wainwright vs. Bridges, only two of the Judges of the Court, Judges Taliafero and Howell, held slave contracts invalid" (!!!)

May it please this Honorable Court: *None* of the judges of the Supreme Court of Louisiana, nor any one of the legal profession, of whom we have ever heard, held slave contracts to have been invalid in their inception. On the contrary, they have been universally regarded as valid, but *their enforcement rendered illegal,* unjust and improper by the acts of the sovereign authority. We pray the special attention of this Honorable Court to the decision of the Supreme Court of Louisiana, in the case of Wainwright. 19 An., p. 240.

On page 14, of the plaintiff's brief, the following extraordinary paragraph occurs, viz:

"The large amount of debts owing by the people of Louisiana at the close of the war, (much of which was held abroad,) made it important to lessen their liability as much as possible. How effectually they have done what was desirable in this regard, may be inferred from the prohibitions against recovery on slave contracts or contracts for Confederate money, and the rigid enforcement of the laws of prescription."

May it please your honors: The debts due by citizens of Louisiana for slaves, were *domestic* debts; and as to prescription affecting *foreign debts,* the act of Congress suspended prescription, when the parties, creditor and debtor, lived on opposite sides of the belligerent lines during the war,

The soundness and integrity of the jurisprudence of the State of Louisiana upon the law of prescription, as well as upon the liability of debtors to pay the unpaid price of slaves, since emancipation, cannot, as we think, be successfully called in question upon the grounds above stated.

Before proceeding to the consideration of the merits of the case upon the part of defendant, it is proposed to notice the authority relied on upon the part of the plaintiff, to sustain the jurisdiction of this Hon. Court. It is the case of Stewart vs. Kahn, 11 Wallace, pp. 501–502.

With great deference and respect for the ex-Chief Justice of Louisiana, we think the construction which he has put upon this case is erroneous, and that it is not analogous to the case now before the Court.

In that case, the plaintiff sought protection against the defendant's plea of proscription, under the special act of Congress, and this Hon. Court gave him the benefit of the act, though not specially pleaded; because no replication or rejoinder being allowed or required under the system of practice in Louisiana, the plaintiff was held to be entitled to the benefit of the act, in order to repel the defence, and sustain his action, *as if the act had been specially pleaded.*

In the case before the Court, the plaintiff appears before this Hon. Court, by writ of error, seeking *protection* against an article of the State Constitution, which he has not pleaded, and which *he could not* have pleaded, either in his original petition nor in a rejoinder, because the article, *if plead by him*, would have been perfectly annihilative of his cause of action.

On the other hand, the article was not pleaded by the defendant in his answer, nor was it necessary to his defence, under the jurisprudence of the State, at the time the pleadings were made up—neither was the article, referred to by the Judge, of the first instance, *as the law* upon the authority of which his decision was rendered.

We, therefore, submit, with great confidence, that the article of the Constitution referred to, must be regarded as *coram non Judice*, and, consequently, that the case does not come within the jurisdiction of this Hon. Court.

Should your Honors not concur in these humble views of defendant, we pray the consideration of the Court to the following grounds of defence, upon the merits:

It is apparent that the consideration of the note sued on, in the above case, was an African slave, and the following pleas and equitable estoppels are relied upon on the part of the defense, viz:

1st. That by the act of the sovereign authority, which is equally binding upon the plaintiff and defendant, and for which the said plaintiff is equally responsible with the defendant, the consideration, for which the note sued on was given, has been destroyed, and that the plaintiff is estopped and restrained from obtaining, and the Court from granting, a judicial remedy to enforce the performance of a contract, based upon African slavery.

2d. That said contract having been entered into, on the part of both plaintiff and defendant, with reference to, and under guarantees and protection contained in the laws and Constitution of the Federal and State Governments, upon the subject of African slavery, and those guarantees and protection, which entered into the consideration for which the note sued on was given, having been revoked, annulled, and abolished, by the sovereign authority of the Federal and State Governments, the plaintiff is estopped and restrained from obtaining, and the Court from granting, a judicial remedy to enforce the performance of the said contract.

3d. That by the acts of the sovereign authority as aforesaid, the judicial remedy can no longer be invoked to enforce the rights acquired by this defendant, under the contract sued upon, and that the said plaintiff is estopped and restrained by equity and good conscience, from obtaining, and the Court from granting, a *judicial remedy* to enforce the performance of the said contract, in favor of one of the contracting parties *only*.

4th. That by the acts of the sovereign authority, as aforesaid, African slavery has ceased to be the subject of conventional obligations, and of judicial action, and it is contrary to equity, to good conscience, to good morals, and public policy, to enforce the performance of obligations which have no longer, the sanction of the laws of the land, and under which the reciprocal rights and res-

ponsibilities of parties, created by said contracts, can no longer be enforced by judicial authority.

In view of the importance of the question at issue, defendant craves the indulgence of this honorable Court, in submitting to their consideration the following arguments and authorities, in support of the above pleas, and equitable estoppels, which he has interposed to the enforcement, by the judicial authority, of the contract sued upon.

In framing and placing upon this judicial record the above pleas and equitable estoppels, the defendant has not been conscious of taking a position, professionally or otherwise, at all *antagonistic* to the inviolability of contracts, "the good faith of merchants," or the *moral* obligations of contracts, which sometimes survive the *legal tie.* Nor is it his purpose to advance an argument, or a single thought, that can be so construed, (fairly,) as to involve such *moral* or *professional* delinquency, whatever may be the *legal* errors (if any) into which he may, unconsciously, have fallen. With loyalty to the *truth*, therefore, and under acknowledged allegiance to that authority which "requireth truth in the inward part," it is proposed, briefly, to discuss the grave question now pending before this honorable Court.

That the question has arisen for the *first* time, and, doubtless, the *last* time, before the judicial tribunals of the country, is a proposition which at once cuts off all resort to precedents or analogous cases, as a guide or light, to direct the course of investigation, so far as the jurisprudence of the State of Louisiana is concerned. Neither is there any law in the Civil Code or statutes of the State, by which provision has been made, for the adjustment of private rights and responsibilities, growing out of the abolition of slavery, by the sovereign authority of the State, or of the United States. *All legislation*, under the State government, and *every private* contract, based upon African slavery, having been based upon the principle, *universally understood*, if not *expressed*, that the system would *continue—as the trees grow, and the waters flow, and the earth continues to yield its fruits!*

The truth of *these positions*, will doubtless be apparent to every intelligent mind, and will not be seriously questioned by any one. The emancipation sentiment or principle, could not have been embodied in the laws of Louisiana, supposing the will of the people, expressed in the forms of legislation, to have formed the laws of the State; for it was not the will or sense of the people, prior to the accomplishment of the fact, that slavery *should be abolished.*

The sovereign people of the State have, however, (as *we must assume*) abolished African slavery, as the best, if not the only means of securing to themselves and their posterity, the blessings of civil society and government.

But we should look in vain, in the *previous* laws and jurisprudence of the State, for *any thing* having the *remotest bearing* upon the question before the Court.

It may, therefore, be assumed as a position, impregnable, and incontestible, that a *contingency* has occurred, in the judicial administration of the public justice, to which "*no express law applies,*" and which is thus expressed and provided for in the Civil Code, viz:

Art 21.—"In civil matters *where there is no express law*, the Judge is bound to proceed and decide according to *equity.* To decide equitably, an appeal is to be made to *natural* law and *reason*, or received usages where *positive law is silent.*"

In the absence, then, of "express law," and where "positive law is silent, the Judge" is bound to render such decision, as shall give "*the sanction of law* to the precepts of reason."

But a *legal question* is supposed to arise, out of the relations of the vendor and vendee of an African slave, which it is supposed (*notwithstanding the foregoing propositions,*) must be solved under the provisions of the Code, on the subject of *warranty*, viz: The question of waraanty, on the part of the vendor, as regards the acts of the sovereign power. It might, and we think it would be, a sufficient answer to such a proposition, to suggest that *in all that relates* to the emancipation of slavery by the sovereign authority—its *incidents* and *its effects upon private contracts*, and *conventional obligations*, based upon slavery, the Code is *profoundly "silent."* There *is certainly no limitation*, of the vendor's warranty, as to the acts of the sovereign power, *under which* he could claim *exemption*, from warranty The *truth* in the premises is, however, (as *we* think,) *this*, viz: The Code is absolutely "*silent*" upon the question.

But the question of warranty, which is supposed to arise between the vendor and vendee of a slave, when emancipated by the act of the sovereign power, (and which is supposed to lie in the way of a decision of the question before the Court, under the authority of Art. 21 of the Civil Code, above cited,) admits, as we humbly conceive, of a *still more satisfactory solution*. It is this: African slavery, the subject matter of the contract sought to be enforced, was not the product or *creature of private contracts, nor of conventional obligations. No! No!* It was the *creature* of the civil government, *sanctioned*, maintained, and *sustained*, by the sovereign authority of the State and of the United States In *this* it "*lived, and moved, and had its being*," and *without* the *agency* of the government, upholding and enforcing it, it ceased to be; and *no private contract or conventional obligation*, based upon it, without this authority, could have *had a legal existence* or *any legal effect whatever.* "*Ex propria vigore*"

Nay, more: Had the negro—the consideration, for which the note sued on was given—not been included in the *status* or condition, of those *held in bondage, under the authority of the laws and government of the State*, the vendor (had the negro been removed from one part of the State to another,) would have been guilty of a flagrant offense, *in making the sale*, for which he would have been punishable, *under the criminal laws of the State, by fine and imprisonment at hard labor in the Penitentiary" !!* See *Kidnapping*, Free Persons. Revised Statutes, p 138, sec. 22.

Again: If it be objected, that the *loss of the property, conveyed* by the contract, should fall upon the *vendee*—according to the maxim of the law: "*Res perit domino.*" The answer is: "*Res* NON *perit!*"

The thing *did not perish!*" But *the title* to the thing, together with *the contract based upon it*, have *both* perished! under the sovereign action, and fiat, of the supreme authority. "*Sublata fundamento cadit opus.*"—(To be shown hereafter.)

The pretension, therefore, that the vendor did, or *did not warrant (!!!)* against the acts of the government, or sovereign authority, presents to the humble conception of the defendant, an *idea, incongruous! unfounded! in truth* and *the reason of things.* We therefore respectfully dismiss it.

What, then, is the question before the Court? It is proposed to enforce, by the *judicial* authority, the performance of a contract based upon African slavery, now that slavery has been *abolished*, by the *political or sovereign authority!*

Sirs! Sirs! What *is* this contract *now!* What *was* it *when it came from the hands of its makers!*

It was essentially a reciprocal contract, containing *mutual*

*covenants*, reciprocal obligations, reciprocal rights, and *reciprocal remedies*.

What *were* those *mutualities* and reciprocities?

The vendor covenanted with the vendee, *(binding himself, his heirs, executors* and assigns,) under the title which he conveyed to the vendee, of this African slave, to maintain the vendee and his heirs in the *peaceable* possession of the slave, *in perpetuity*—a possession *without limitation*, at least so far as the contract—*the lex contractus* or the *lex temporis* were concerned—the *only condition* to this warranty of perpetual and peaceable possession, *being, that the right, of the person evicting, should have existed before the sale.*" Civil Code, arts. 2478, 2451.

But the vendor was also bound to warrant the vendee, against any "*hidden defects or redhibitory vices*" of the slave.

What *were* the "hidden" or "latent defects of the slave? They are thus defined by the Civil Code, (Arts. 3500; 2501-2-4,): "The latent defects of *slaves and animals*, are divided into *two* classes: vices of body and vices of character." "The absolute vices of *slaves* are *leprosy, madness* and *epilepsy.*"

The *other* vices of *body*, as well in *slaves* as in *animals*, are included in the definition given at the commencement of this paragraph."

Thus your honors will perceive, (assuming the contract to have been in the ordinary form of a sale—it *having been a succession sale,*) that the range of responsibility, conventional, as well as legal, which was created, on the part of the vendor of the slave, was *extensive*,—the responsibility *weighty, often difficult*,—in the performance! I need hardly advise your honors that, from all these responsibilities, the sovereign authority has *relieved* the *vendor*, "*his heirs, executors and assigns!*"—*rendering* THEM *illegal.*

What were the *rights* acquired by the *vendee* of the slave, *under this contract?* They, too, were *numerous, important, valuable*, under *the lex contractus et temporis.*

To *own*, possess, to mortgage and hypothecate, to sell, to transmit by succession, in *perpetuity*, to the heirs and descendants of the vendee, the *slave*, and, if it were a female, *her* offsprings and *their* issue, through coming generations! I need hardly advise your honors that these rights of the vendee, acquired under this contract, have, by the act of the sovereign authority, *ceased to exist*; nay, been stricken with *absolute nullity*, once and forever!

In short, your honors, to resolve the consideration of the mutual and reciprocal rights and obligations, created by this contract, and which have been stricken out by the sovereign authority, into a single proposition: *all the burdens upon the one hand, and all the benefits upon the other, had been stricken out, nullified—rendered illegal!*—BEFORE THIS ACTION WAS INSTITUTED.

In view, therefore, of the contract, in its present *legal status and form*, before the Court, we say to this *plaintiff*, and to this honorable *Court*, in behalf of this defendant: *In hac federæ non veni. Into this* contract or covenant, we *never* entered. To such a contract as *this* we *never* affixed our signature!

But the judicial remedy, or right of action, upon the contract, has been *entirely* changed, from what it was, when it was entered into between the parties, by the act of the sovereign authority. "It is of the *essence* of this species of contract to give rise to reciprocal actions." The Code of Practice thus provides:

Article 39—"It is of the essence of all synallagmatic contracts—that is to say, of those which contain *reciprocal obligations* between the parties, to give rise to two species of direct actions."

Article 14 of the same Code provides as follows: "Every obliga-

tion gives impliedly a right of action to enforce its execution; but the obligation and the right do not always arise at the same time. Thus, in contracts to be performed at a future period, the obligation, which grows out of the contract, arises at the very moment of making it, but the right of action growing out of it, arises only when the stipulated term has arrived"

Now, at the time the right of action was *resorted* to, and the judicial remedy was invoked, to enforce the performance of this contract, in *favor* of the vendor, *no right of action* remained to the *vendee*. He is remediless, powerless before the Court, to obtain the enforcement of *any* of the stipulations of the contract *in his* favor—that which was *essential* to the contract having been stricken out by the act of the sovereign authority!

We therefore submit, that "*the plaintiff is estopped*, by *equity* and *good conscience*, from obtaining, and the Court from *granting*, a judicial remedy to enforce the performance of the contract, in favor of *one of the contracting parties only*."

May it please the Court: It will be seen that the pleas and estoppels relied upon, in avoidance of the plaintiff's action, are *twofold* in their character—being addressed to the *plaintiff*, and likewise to the *Court*, the honored representative of the sovereign power, which has interposed in the contract, entered into between the parties litigant, rendering it null and void, *and illegal* in its *most material parts*, if, indeed, it be not *held* to be null and void *in all its stipulations*.

It may be necessary, therefore, to consider *the previous action*, as well as the *present status, or position*, of the sovereign power, in reference to the *subject matter* of the contract, *sought to be enforced by its authority*.

We said, (and we *think truly*,) that African slavery was not the product, or creature of *private contracts*, nor of *conventional obligations*. On the contrary, it was *the creature of the civil govrrnment*, of the sovereign power of the State and of the United States.

Under the authority of the latter, the African Slaver was *permitted*, if not *invited* (until 1808,) to come into the ports, and *markets* of the Southern States. Whilst under the former authority, the system of African slavery received the unqualified sanction and protection of the laws and government of the State of Louisiana, until 1864—the *contract based upon it*, and sought to be enforced, having been entered into, between the parties contracting, *prior* to the latter date. The Convention of 1864, acting as the sovereign power of the State of Louisiana, *abolished* the system of African slavery, rendering, *ipso facto*, null and void all the laws of the State based upon it, thereby revoking and annulling, by necessary implication, the *legal sanction*, and protection under which the contract sued upon was made. It would *seem* to follow, as a necessary, and almost *irresistible conclusion*, that the *contract itself*, which was a law *between the parties, based upon slavery*, was likewise rendered *null* and *void*, by the ordinance of the Convention, *abolishing* slavery. For it would be a most extraordinary incongruity in the operation and effect of the ordinance, if it should be *held to have rendered null and void, all laws previously passed by the Legislature*, upon the subject of slavery, and, at the same time, to have *left in full force and effect* all *contracts previously based upon it, in any of their stipulations*—a *contract having* "*the effect, of laws between the parties*. Civil Code, Art. 1895."

May it please the Court: No *constitutional* difficulty or question, can arise here, in regard to "impairing the obligation of con-

tracts, or "destroying vested rights" by *legislative action (!!)* as *inhibited* by the constitution of the State and of the United States. And *wherefore!* For the simple reason that the power *acting in the premises*, is the *power* that *makes* constitutions—*not* to *fetter* or *restrain* its *own* action, but to regulate and restrain the action of its subordinate agents, or agencies, viz: The Legislative, Executive and Judicial departments of the Government.

If it be objected: That by the Constitution of the United States, the *States* are inhibited from "destroying vested rights," or "impairing the obligation of contracts," either by *legislative* or *conventional* action, the answer is, that the Convention of 1864, did but co-operrte with the sovereign power of the United States, in its action, upon the subject matter of the contract under consideration.

May it please the Court; The *present* status, or position, of the sovereign authority of the State, and of the United States, upon the subject matter of this contract, is *utterly inconsistent* with and *repugnant to the judicial remedy* sought by the plaintiff for its enforcement. It is still *more* (if possible *inconsistent with* and *repugnant to every* stipulation contained in the *contract itself.* The sovereign authority has recognized, and does *now recognize*, before the eyes of the whole world, and *enforce*, a right, in the *African slave*, *superior* to that of his former master, and older than the vendor's deed! A *right* (*according to the sentiment which has prevailed*) "held not by charters!" wrested from unwilling owners, "but the bountiful gift of the author of nature." A *right*, in view of which, *every stipulation contained in the contract*, must, (as we humbly conceive,) fly away! *and no more place be found for them, in the judicial administration of the government!!*

What, then, must be the effect, moral, legal, and constitutional, of the *present* "status" and *previous action* of the sovereign power, (the *august moral person*, whom we desire presently to introduce to the Court, under the favor and *auspices of Vattel*,) upon this contract, as well as upon the judicial remedy sought to enforce it? We answer, *nullity, absolute nullity!*

It were vain, as we think, to speak, and, to us, wondrous *strange*, to *think*, of the continuance and enforcement, *in any shape or form*, of *private contracts*, based upon slavery, which are *but a law* between the parties, embodying *their mutual wills*, upon the subject matter of the contract; when the *laws* passed ("*the solemn declaration of the legislative will*") *upon the same subject*, are, by the *fiat* of this mighty, and, (*in the theory of the social compact, State* or *National.*) truly *august Moral Person, rendered absolutely null* and *void!*

We venture, (*with unfeigned diffidence,*) to offer a few reflections, upon what would *seem* to be *consistent* and *obligatory*, upon the sovereign authority, (acting through the judicial department of the government,) upon the subject under consideration, having reference to its *previous* action and *present status*, in the premises. And, to guide us in these reflections, we propose to cite a few elementary principles, laid down by Vattel, in his law of nations, which, as we think, have a strong *bearing* upon, if they do not reach, *with the full force of application*, the question before your honors.

"IDEA AND GENERAL PRINCIPLES OF THE LAW OF NATIONS."

"Nations or *States*, are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength. Such a society has her affairs and her interests; she deliberates and takes resolutions in common; *thus becoming a moral person, who pos-*

*sesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights.*"

Again:

"As men are subject to the laws of nature—and as their union in civil society cannot have exempted them from the obligation to observe those laws, since by that union they *do not cease to be men —the entire nation*, whose common will is but the result of the united wills of the citizens, remains subject to the *laws of nature*, and is *bound to respect them in all their proceedings*" (P. LVI.)

Again your honors: In *defining* and classifying the *laws* by which nations are governed, this learned author says. (p. LVIII:) "We call that the *necessary law of nations*, which consists in the application of *the law of nature* to *nations*. It is *necessary*, because nations are *absolutely* bound to observe it. This law contains the precepts prescribed by the *law of nature* to *States*, on whom that law is not less obligatory than *on individuals*, since States are composed of men, their resolutions are taken *by men*, and *the law of nature* is binding upon *all men*, under whatever relations they act. This is the law which Grotious, and those who follow him, call the *internal* law of *nations*, on account of its being obligatory on nations, *in point* of *conscience*."

May it please your honors: It is proper here to observe, that this honorable Court must be regarded, (as *we think*,) as the *representative* of this "*moral person*" (referred to,) in whatever action it may take upon the *subject matter of the contract*, sought to be enforced—*not the mere organ or expounder of the law, nor the representative of the Legislature*, which enacts laws; but of a higher power—the *sovereign authority*, which *creates* Legislatures! and Judicial Tribunals!—the *moral person*—above described—not *seen*, but *felt*—and its being recognized.

In those elementary principles, therefore, above cited, which are regarded as proper for the *government* of *States* and of *Nations*—nay, *absolutely binding*"—we submit, that your honors representing the said *moral person*, will be able to find, (in the opinion of defendant,) a rule or principle of governinent, as respects the action of the Court, *upon the foregoing pleas and estoppels*, addressed to the sovereign authority, which cannot fail to lend to a satisfactory conclusion upon the question before the Court.

Those principles, we submit, would *seem* to require the same *consistency* of action, on the part of the sovereign power, or *moral person*, which would be binding upon an *individual*.

Will your honors, therefore, permit this *august Person! who presides over the affairs and destinies of States!* and of *Nations!* to occupy, for a few moments, *the seat of judgment!* whilst we address, *most reverently!* a few plain interrogatories, *to his Majesty. in Person*, ("*on facts and articles*,") requesting your honors, most respectfully, to attend to "the responses,"—*supposing them to be according to truth*,—and apply the principles above cited, to the subject matter of the interrogatories, as we advance

1. *May it please your Majesty!* In view, of your *sovereign action*, upon the subject of African slavery, previous to your late acts of emancipation, *were you not the author* of the *title* to the African slave, recently *in the possession* of the parties litigant, *and who are now before your Majesty—which title your Majesty, by your sovereign authority*, has *recently abolished?*

2. Has not your *Majesty!* by your sovereign authority, changed, *in its most material parts*, the contract between these parties?

3. Has not your *Majesty, by your sovereign* authority, rendered it wholly valueless to *one* of the contracting parties—that is, to the defendant?

4. And has not your *Majesty*, by your sovereign act, left the defendant wholly remediless—under the judicial authority—to enforce the performance of any of the stipulations contained in this contract—*in his favor?*

Should the foregoing interrogatories be answered, severally, in the affirmative, as we respectfully suggest they must be, *how can* your Majesty, in equity and good conscience, or in consistency, with the sovereign justice, proceed to enforce, by your authority, the performance of this contract against this defendant.

5. Again, your Majesty: Were you not aware that the *vendor* of the African slave *(whom your Majesty has recently discharged from the bondage, in which your Majesty held him,) traces* his *title back to one "Peter Funk!"* who, some years since, came into your Majesty's "ports," and "markets," *(under the authority and sanction of your Majesty,)* with a "cargo" of African slaves—"fresh" from the coast of Africa, viz: Tony, Cudjo, Mingo, and Banjo, and their female companions,—("names not recollected")—the said "Peter," *not being at that time a resident of these parts of your Majesty's dominions*—and that the *title* to the said slave, whom your *Majesty!* has recently manumitted, has been derived (by sundry "mesne conveyances,") from the said *"Peter Funk!"*

6. Has not your *Majesty!* (co-operating with other Sovereignties,) driven the said "Peter Funk" from the "face of the Earth!" and of the "Seas!" and will your *Majesty! (assuming that the* LAST *and the* FIRST *vendor of an African slave, occupy the same status before your Majesty!) now invite him into your Temple of Justice!* and not *rather* point him to the inscription which your *Majesty!* has *recently* caused to be made upon the door of the Temple—to-wit: *"Procul! O procul! este profani?"*

Nay, further, your *Majesty!*

7. Has not your *Majesty! by your sovereign fiat*, stricken with *death—moral! political!* LEGAL!! and CONSTITUTIONAL!!!—the said "Peter Funk?" And *can your Majesty now consent to become the executor of his last will and testament?—enforce his* CONTRACTS?—COLLECT HIS DUES, AND MAKE DISTRIBUTION THERFOF?!!!!

*In view, therefore, of the premises:* Is it not *apparent to your Majesty!* that the enforcement of the performance of the contract, before your *Majesty!* (and others of *a similar* nature,) would *involve* an *inconsistency of action*—nay! *an obliquity!—moral!—equitable—legal and* CONSTITUTIONAL! which would reflect discredit upon the *character*, and *taint the conscience*, of the humblest of your *Majesty's loyal subjects!*

We therefore most humbly invoke your *Majesty's* most serious consideration upon the following proposition, to-wit:

*"That, by the acts of the sovereign authority, as aforesaid, African slavery has ceased to be the subject of conventional obligations, and of judicial action, and it is contrary to equity; to good conscience, to good morals, and public policy, to enforce the performance of obligations, which have no longer the sanction of the laws of the land, and under which the reciprocal rights and responsibilities of parties, created by said contracts, can no longer be enforced by judicial authority."*

Respectfully submitted by

H. MARSTON,

The defendant in *propria persona.*